

McCurdy, Lauren

From: Vapnek, Paul W. [pwvapnek@townsend.com]
Sent: Wednesday, June 16, 2010 4:29 PM
To: McCurdy, Lauren
Cc: Difuntorum, Randall; Lee, Mimi; hbsondheim@verizon.net; mtuft@cwclaw.com; kevin_e_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu; Ellen Peck; ignazio.ruvolo@jud.ca.gov; Robert L. Kehr; martinez@lbbslaw.com; slamport@coxcastle.com; Mark Tuft; Jerome Sapiro Jr. (E-mail)
Subject: RE: RRC ASSIGNMENT MATERIALS FOR PAUL VAPNEK: June 25 & 26, 2010 Meeting - Due June, 16th

RE: Rule 1.5
6/25&26/10 Commission Meeting
Open Session Agenda Item III.G.

Lauren and everyone else:

Pardon the massive email, but there was little time to review all the comments, figure out what they were saying, and then trying to figure out if any warranted any changes in the proposed rule. My lead assignment was for the following rules: 1.1, 1.5, 1.8.8, 2.3, 3.2, 6.4, 6.5, and 8.4. There was no time that I had within which I could consult with my co-drafters, so I take full responsibility if anyone disagrees with me. The only rule change that should be discussed is the proposed changes to rule 1.5 that Randy, Kevin and I have been working on post our last meeting. I have tried to review all the comments that have been made, but none persuade me that we should propose any modification of any RULE except for 1.5. There may very well be some proposed changes to some of the comments, but I understand that these will be done between now and the next meeting on the 25th.

From: McCurdy, Lauren [mailto:Lauren.McCurdy@calbar.ca.gov]
Sent: Thursday, June 10, 2010 2:34 PM
To: Vapnek, Paul W.
Cc: Difuntorum, Randall; Lee, Mimi; hbsondheim@verizon.net; mtuft@cwclaw.com; kevin_e_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu
Subject: RRC ASSIGNMENT MATERIALS FOR PAUL VAPNEK: June 25 & 26, 2010 Meeting - Due June, 16th
Importance: High

Paul,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

ASSIGNMENT SUBMISSION DEADLINE: The assignment submission deadline for all assignments is 5:00 pm on Wednesday, June, 16, 2010.

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synthesizing all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only

Rule 1.5: Fees For Legal Services
(Rule Draft 13.3 (6/9/10) – COMPARED TO PCD [#11] (12/14/09))

- (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.
- (b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or would constitute an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.
- (c) Among the factors to be considered, where appropriate, in determining the conscionability of a fee or in-house expense are the following:
- (1) the amount of the fee or in-house expense in proportion to the value of the services performed;
 - (2) the relative sophistication of the lawyer and the client;
 - (3) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (5) the amount involved and the results obtained;
 - (6) the time limitations imposed by the client or by the circumstances;
 - (7) the nature and length of the professional relationship with the client;
 - (8) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (9) whether the fee is fixed or contingent;
 - (10) the time and labor required;
 - (11) whether the client gave informed consent to the fee or in-house expense.
- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
- (1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or
 - (2) a contingent fee for representing a defendant in a criminal case.
- (e) A lawyer shall not make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar

terms, fee, except: unless the client simultaneously is advised in writing that the client nevertheless may discharge the lawyer at any time, seek a refund of all or part of the fees charged, or both.¹

(f) Notwithstanding paragraph (e), the following fee arrangements are permitted. Subject to the requirements of this Rule, including paragraph (e), a lawyer is permitted to denominate a fee as "earned on receipt" or "nonrefundable" in making an agreement for the following types of fee arrangements.²

- (1) a lawyer may charge a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, in addition to and apart from any but not as compensation for legal services

¹ RRC Action: At the 6/4/10 meeting, the RRC voted 8-2-0 to revise the introductory paragraph of paragraph (e) as indicated, and make it a stand-alone paragraph. See 6/4/10 KEM Meeting notes, III.G., at ¶. 2B. Previously, paragraph (e) had provided:

A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:

As part of the motion, the RRC directed the drafters to add a comment to the effect that "may" does not mean that the client is entitled to a refund. Id. See Comment [6A], below.

² Drafters' Note: The introductory clause of paragraph (e) has been revised to make clear that the requirements set forth apply only to fee agreements that purport to be "earned on receipt," "nonrefundable," etc.

performed or to be performed.³ A true retainer that denominates the fee as "earned on receipt" or "nonrefundable," or in similar terms must be agreed to in a writing signed by the client.⁴ Unless otherwise agreed, a true retainer is the lawyer's property on receipt.⁵

³ RRC Action: At the 6/4/10 meeting, the RRC voted 10-0-1 to revise the first sentence of subparagraph (1) as indicated. See 6/4/10 KEM Meeting Notes, III.G., at ¶. 1.d1. Previously, the sentence had provided:

"a lawyer may charge a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed."

⁴ RRC Action: At the 6/4/10 meeting, a motion to move the second sentence of subparagraph (1) into a comment was defeated by a 2-8-0 vote. See 6/4/10 KEM Meeting Notes, III.G., at ¶. 1.e.

Subsequently, the retention of that sentence was deemed approved, together with adding a comment explaining what the writing should include. See 6/4/10 KEM Meeting Notes, III.G., at ¶. 1.e1.

Drafters' Note: Comment [8] already included a sentence that explained what the writing should include. See Comment [8], last sentence, as revised. Also, the drafters have added a clause to the second sentence of paragraph (f)(1) to clarify that the writing requirement applies only to true retainers that purport to be nonrefundable, etc.

⁵ RRC Action: At the 6/4/10 meeting, the RRC voted to delete the third sentence of subparagraph (1) and add to Comment [8] a cross-reference to Rule 1.15, cmts. [8] and [9]. See 6/4/10 KEM Meeting Notes, III.G., at ¶. 1.f1. The last sentence had provided: "Unless otherwise agreed, a true retainer is the lawyer's property on receipt."

- (2) ~~a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services.⁶ If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed. A flat or fixed fee agreement that~~

⁶ RRC Action: At the 6/4/10 meeting, the RRC voted 8-0-2 to retain the first sentence but to strike every else in subparagraph (2). See 6/4/10 KEM Meeting Notes, Ill.G., at ¶. 3A. The remainder of subparagraph (2) had provided:

If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

denominates the fee as "earned on receipt" or "nonrefundable," or in similar terms must be agreed to in a writing signed by the client.⁷

- (fg) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client's interests unless the client is either represented with respect to the modification by an independent lawyer or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice.

COMMENT

Unconscionability of Fee

[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public

⁷ Drafters' Note/Recommendation: The drafters have added a sentence to parallel the second sentence of subparagraph (f)(1). As part of its vote to delete the balance of proposed subparagraph (2) at its 6/4/10 meeting, the Commission rejected a writing requirement for "all flat fees". See 6/4/10 KEM Meeting Notes, Ill.G., at ¶. 3.c. However, as now drafted, the requirement is only imposed on flat/fixed fee agreements that purport to be "earned on receipt" or "nonrefundable". The drafters request that the Commission reconsider its vote so that both true retainers and flat/fixed fees that purport to be "nonrefundable," etc., must be in a writing signed by the client.

policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. (e.g., *Birbrower, Montalbano, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.)

[1B] Paragraph (b) defines an unconscionable fee. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule. In-house expenses are charges by the lawyer or firm as opposed to third-party charges.

Basis or Rate of Fee

[2] In many circumstances, Business and Professions Code, sections 6147 and 6148 govern what a lawyer is required to include in a fee agreement, and provide consequences for a lawyer's failure to comply with the requirements. (See, e.g., *In re Harney* (1995) 3 Cal. State Bar Ct. Rptr. 266.)

Modifications of Agreements by which a Lawyer is Retained by a Client

[3] Paragraph (fg) imposes a specific requirement with respect to modifications of agreements by which a lawyer is retained by a client, when the amendment is material and is adverse to the client's interests. A material modification is one that substantially changes a significant term of the agreement, such as the lawyer's billing rate or manner in which fees or costs are determined or charged. A material modification is adverse to a client's interests when the modification benefits the lawyer in a manner that is contrary to the client's interest. Increases of a fee, cost, or expense pursuant to a provision in a pre-existing agreement that permits such increases are not modifications of the agreement for purposes of paragraph (fg). However, such increases may be subject to other paragraphs of this Rule, or other Rules or statutes.

[3A] Whether a particular modification is material and adverse to the interest of the client depends on the circumstances. For example a modification that increases a lawyer's hourly billing rate or the amount of a lawyer's contingency fee ordinarily is material and adverse to a client's interest under paragraph (fg). On the other hand, a modification that reduces a lawyer's fee ordinarily is not material and adverse to a client's interest under paragraph (fg). A modification that extends the time within which a client is obligated to pay a fee ordinarily is not material and adverse to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.

[3B] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms length transaction. *Setzer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement that are in addition to the requirements in Paragraph (fg). Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. (See, e.g., *Ramirez v. Sturdevant*

(1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; *Berk v. Twentynine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212 [64 Cal.Rptr.915].) Depending on the circumstances, other Rules and statutes also may apply to the modification of an agreement by which a lawyer is retained by a client, including, without limitation, Rule 1.4 (Communication), Rule 1.7 (Conflicts of Interest), and Business and Professions Code section 6106.

[3C] A modification is subject to the requirements of Rule 1.8.1 when the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees.

Terms of Payment

[4] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. (See Rule 1.16(e)(2)) A fee paid in property instead of money may be subject to the requirements of Rule 1.8.1.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay.

Prohibited Contingent Fees

[6] Paragraph (d)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of balances past due under child or spousal support or other financial orders because such contracts do not implicate the same policy concerns.

Prohibited Designation of Fees as Nonrefundable

[6A]⁸ Paragraph (e) prohibits the designation of a fee as "earned on receipt," or as "nonrefundable," or in similar terms unless the required disclosures

⁸ Drafters' Note: Comment [6A] is taken in part from Comment [6A] to Draft 12.3 (6/1/10) of proposed Rule 1.5 and also from Comment [7] to Arizona Rule 1.5. Arizona Comment [7] provides in full:

[7] Advance fee payments are of at least four types. The "true" or "classic" retainer is a fee paid in advance merely to insure the lawyer's availability to represent the client and to preclude the lawyer from taking adverse representation. What is often called a retainer but is in fact merely an advance fee deposit involves a security deposit to insure the payment of fees when they are subsequently earned, either on a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. A nonrefundable fee or an earned upon receipt fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. The agreement as to when a fee is earned affects whether it must be placed in the attorney's trust account, see ER 1.15, and may have significance under other laws such as tax and bankruptcy. But the reasonableness requirement and application of the factors in paragraph (a) may mean that a client is

concerning the client's right to discharge the lawyer and the potential for a refund are made. The unconscionability requirement of paragraph (a) and the application of the factors in paragraph (c) may mean that a client is entitled to a refund of an advance fee payment even though it might have been denominated as "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (e) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund, nor does it determine how any refund should be calculated, but merely requires that the client be advised of the possibility of the entitlement to a refund. In addition to the unconscionability of a fee, a client's entitlement to a refund might be

entitled to a refund of an advance fee payment even though it has been denominated "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (d)(3) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund upon early termination of the representation (e.g., factor (a)(2) might justify the entire fee), nor does it determine how any refund should be calculated (e.g., hours worked times a reasonable hourly rate, quantum meruit, percentage of the work completed, etc.), but merely requires that the client be advised of the possibility of the entitlement to a refund based upon application of the factors set forth in paragraph (a). In order to be able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it would be advisable for lawyers to maintain contemporaneous time records for all representations undertaken on any flat fee basis.

based upon: (1) a determination that all or a portion of the fees paid have not been earned; or (2) some other failure of consideration, such as a natural disaster that destroys the lawyer's law office making it impossible for the lawyer to render the agreed upon legal services. The foregoing examples are not intended to be a comprehensive statement of all possible bases for a client's entitlement to a refund. Although there is always a potential for a refund because of subsequent events, paragraph (e) does not prohibit a lawyer from making an agreement for a fee which is earned upon receipt so long as the required disclosures are made in a writing signed by the client. As indicated by case law, however, a client may be entitled to a refund notwithstanding the characterization of the fees paid. See, e.g., *Matthew v. State Bar* (1989) 49 Cal.3d 784 [263 Cal.Rptr. 660]; *In re Matter of Lais* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907. While discipline may result from a failure to refund fees, a primary forum for the resolution of fee dispute issues is mandatory fee arbitration under the State Bar Act (see Bus. & Prof. Code §6200 et. seq.) Nothing in this rule is intended to prejudge the outcome of fee arbitration proceedings as this rule, like any law, must be applied to the facts of a particular matter.

Payment of Fees in Advance of Services

[7] Every fee agreed to, charged, or collected, including a fee that is a lawyer's property on receipt⁹ under paragraph (ef)(1) or (ef)(2), is subject to Rule 1.5(a) and may not be unconscionable.

[8] Paragraph (ef)(1) describes a true retainer, which is sometimes known as a "general retainer," or "classic retainer." _A true retainer secures

⁹ Drafters' Note: We have deleted the reference to "lawyer's property on receipt" in keeping with the Commission's approach in this Rule.

availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer under paragraph (ef)(1). In addition to the statements required under paragraph (e), The written true retainer agreement should specify the time period or purpose of the lawyer's availability, and that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer's property immediately on receipt.¹⁰ Concerning the lawyer's obligations with respect to the deposit of a true retainer in a trust account, see Rule 1.15, Comments [8] and [9].¹¹

[9] Paragraph (ef)(2) describes a fee structure that is known as a "flat fee". A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort the lawyer expends to perform or complete the specified services. ~~If the requirements of paragraph (f)(2) are not met, a flat fee received in advance must be treated as an advance for fees. See Rule 1.15.~~¹²

¹⁰ See footnote 4, above.

Drafters' Note: Because paragraph (e) does not permit the lawyer to use language such as "earned on receipt," we have deleted the last clause of this sentence, which stated the lawyer should specify in the written retainer agreement that "the lawyer will treat the payment as the lawyer's property immediately on receipt." The subsequent reference to Rule 1.15, cmts. [8] and [9] should provide the same guidance.

¹¹ See footnote 5, above.

¹² **Drafters' Note/Recommendation:** Because the Commission voted to strike that part of subparagraph (2) that required a lawyer to include certain

~~[10] If a lawyer and a client agree to a true retainer under paragraph (e)(1) or a flat fee under paragraph (e)(2) and the lawyer complies with all applicable requirements, the fee is considered the lawyer's property on receipt and must not be deposited into a client trust account. See Rule 1.15(f). For definitions of the terms "writing" and "signed," see Rule 1.0.1(n).~~¹³

[11] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2). To the extent a fee is unconscionable, it never can be considered to have been earned.¹⁴ In the event of a dispute relating to a fee under paragraph (e)(1) or (e)(2) of this Rule, the lawyer must comply with Rule 1.15(d)(2).

Division of Fee

[12] A division of fees among lawyers is governed by Rule 1.5.1.

statements in a flat fee agreement, we recommend deleting the last sentence of Comment [9], which refers to subparagraph (2)'s "requirements."

¹³ **Drafters' Note:** In light of the added last sentence of Comment [8], this Comment is no longer necessary.

¹⁴ **Drafters' Note:** Sentence added from Rule 1.5, Draft 12.3 (6/1/10).

Rule 1.5 Fees For Legal Services
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.
- (b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or would constitute an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.
- (c) Among the factors to be considered, where appropriate, in determining the conscionability of a fee or in-house expense are the following:
 - (1) the amount of the fee or in-house expense in proportion to the value of the services performed;
 - (2) the relative sophistication of the lawyer and the client;
 - (3) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (5) the amount involved and the results obtained;
 - (6) the time limitations imposed by the client or by the circumstances;
 - (7) the nature and length of the professional relationship with the client;
 - (8) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (9) whether the fee is fixed or contingent;
 - (10) the time and labor required;
 - (11) whether the client gave informed consent to the fee or in-house expense.
- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or
 - (2) a contingent fee for representing a defendant in a criminal case.
- (e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:

- (1) a lawyer may charge a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A true retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a true retainer is the lawyer's property on receipt.
 - (2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.
- (f) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client's interests unless the client is either represented with respect to the modification by an independent lawyer or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice.

COMMENT

Unconscionability of Fee

- [1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. (e.g., *Birbrower, Montalbano, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.)
- [1B] Paragraph (b) defines an unconscionable fee. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule. In-house expenses are charges by the lawyer or firm as opposed to third-party charges.

Basis or Rate of Fee

- [2] In many circumstances, Business and Professions Code, sections 6147 and 6148 govern what a lawyer is required to include in a fee agreement, and provide consequences for a lawyer's failure to comply with the requirements. (See, e.g., *In re Harney* (1995) 3 Cal. State Bar Ct. Rptr. 266.)

Modifications of Agreements by which a Lawyer is Retained by a Client

- [3] Paragraph (f) imposes a specific requirement with respect to modifications of agreements by which a lawyer is retained by a client, when the amendment is material and is adverse to the client's interests. A material modification is one that substantially changes a significant term of the agreement, such as the lawyer's billing rate or manner in which fees or costs are determined or charged. A material modification is adverse to a client's interests when the modification benefits the lawyer in a manner that is contrary to the client's interest. Increases of a fee, cost, or expense pursuant to a provision in a pre-existing agreement that permits such increases are not modifications of the agreement for purposes of paragraph (f). However, such increases may be subject to other paragraphs of this Rule, or other Rules or statutes.
- [3A] Whether a particular modification is material and adverse to the interest of the client depends on the circumstances. For example a modification that increases a lawyer's hourly billing rate or the amount of a lawyer's contingency fee ordinarily is material and adverse to a client's interest under paragraph (f). On the other hand, a modification that reduces a lawyer's fee ordinarily is not material and adverse to a client's interest under paragraph (f). A modification that extends the time within which a client is obligated to pay a fee ordinarily is not material and adverse

to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.

- [3B] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms length transaction. *Setzer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement that are in addition to the requirements in Paragraph (f). Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. (See, e.g., *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; *Berk v. Twentynine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212 [64 Cal.Rptr.915].) Depending on the circumstances, other Rules and statutes also may apply to the modification of an agreement by which a lawyer is retained by a client, including, without limitation, Rule 1.4 (Communication), Rule 1.7 (Conflicts of Interest), and Business and Professions Code section 6106.
- [3C] A modification is subject to the requirements of Rule 1.8.1 when the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees.

Terms of Payment

- [4] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. (See Rule 1.16(e)(2)) A fee paid in property instead of money may be subject to the requirements of Rule 1.8.1.

- [5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay.

Prohibited Contingent Fees

- [6] Paragraph (d)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of balances past due under child or spousal support or other financial orders because such contracts do not implicate the same policy concerns.

Payment of Fees in Advance of Services

- [7] Every fee agreed to, charged, or collected, including a fee that is a lawyer's property on receipt under paragraph (e)(1) or (e)(2), is subject to Rule 1.5(a) and may not be unconscionable.
- [8] Paragraph (e)(1) describes a true retainer, which is sometimes known as a "general retainer," or "classic retainer." A true retainer secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer under paragraph (e)(1). The written true retainer

agreement should specify the time period or purpose of the lawyer's availability, that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer's property immediately on receipt.

- [9] Paragraph (e)(2) describes a fee structure that is known as a "flat fee". A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort the lawyer expends to perform or complete the specified services. If the requirements of paragraph (f)(2) are not met, a flat fee received in advance must be treated as an advance for fees. See Rule 1.15.
- [10] If a lawyer and a client agree to a true retainer under paragraph (e)(1) or a flat fee under paragraph (e)(2) and the lawyer complies with all applicable requirements, the fee is considered the lawyer's property on receipt and must not be deposited into a client trust account. See Rule 1.15(f). For definitions of the terms "writing" and "signed," see Rule 1.0.1(n).
- [11] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2). In the event of a dispute relating to a fee under paragraph (e)(1) or (e)(2) of this Rule, the lawyer must comply with Rule 1.15(d)(2).

Division of Fee

- [12] A division of fees among lawyers is governed by Rule 1.5.1.

June 7, 2010 KEM E-mail to Vapnek, cc Difuntorum, McCurdy & Lee:

I've attached the following:

1. Rule, Draft 13 (6/7/10), redline, compared to Pub Comment Draft [#11] (12/14/09). In Word.
2. My 6/4/10 meeting notes for Rule 1.5. In PDF.

I've copied Randy so he can have some input on this as well. I thought it best to circulate it to you as lead drafter before circulating it to the other members of the drafting team.

Comments:

1. I've tried to incorporate all of the changes approved by the Commission at the last meeting. However, I think there might be a problem with our adaptation of the Arizona language in paragraph (e). See footnote 1. My concerns are highlighted in yellow. My concerns relate to the fact that in our paragraph (e) we have disconnected the concept of the refund from the early termination of the lawyer-client relationship. If you believe that we got it right during the meeting, then Comment [6A] will require revision.

2. I've added new Comment [6A], which is an adaptation of Randy's proposed Comment [6A] in Draft 12.3 (6/1/10) and Comment [7] to Arizona Rule 1.5. There may be some duplication there but I wanted to be more complete; it's easier to delete than to draft. The language in Comment [6A] that is highlighted in yellow is from the Arizona comment, as revised by me. Other redlining in Comment [6A] are my suggested revisions to Randy's draft.

a. Arizona Rule 1.5 is available at the following link:

<http://www.myazbar.org/ethics/ruleview.cfm?id=25>

3. Other major revisions are explained in the footnotes, w/ references to my notes. Any other changes w/o a footnote explanation should be self-explanatory.

4. I'll revise the public comment chart later. I wanted you to get this draft early as the next meeting will be upon us soon and we will have to run this by the Commission again for a final vote. We also can't prepare the other documents (e.g., Introduction, Rule & Comment Comparison Chart) until we're in agreement on the Rule.

Please let me know if you have any questions.

Attached:

RRC - 4-200 [1-5] - DFT13 (06-07-10) - Cf. to PCD [11] (12-14-09) - LAND.doc

RRC - 4-200 [1-5] - 06-04-10 KEM Meeting Notes - DFT2 (06-07-10).pdf

June 7, 2010 Difuntorum E-mail to KEM, cc Vapnek, McCurdy & Lee:

Here's some quick feedback on the main substantive issue.

For the black letter rule language, I think the Arizona “early termination” concept is intended to be omitted in the RRC’s approach due to the concerns expressed about “completion of services” in the flat/fixed fee context and the message that might be conveyed to clients who will contemplate whether to seek a refund. In the messages that I sent prior to the meeting, I urged a less is more strategy and the omission recorded in your notes is consistent with that strategy.

For the rule comments, I think the idea was that “early termination” might be one example of the various failure of consideration triggers for potential client entitlement to a refund. Other examples were lawyer becoming incapacitated due to health reasons, misconduct such as an undisclosed conflict or fee split, or where the lawyer’s office is destroyed by a natural disaster. These examples would relate to both true retainer fees as well as flat fees. I think the idea was to emphasize that existing law already makes these circumstances possible valid refund scenarios so as to undercut the misperception that the proposed rule itself is creating a new basis for a refund.

June 8, 2010 Difuntorum E-mail to KEM, cc Vapnek, McCurdy & Lee:

Here is a possible alternate formulation of paragraph (f). There are three main differences in this alternate formulation. First, it references all of the requirements of Rule 1.5 rather than just paragraph (e). Second, it makes explicit the fact that a lawyer may use the characterization “earned on receipt” or “non-refundable” in connection with a flat or fixed fee arrangement (and we know from the public comments received that criminal defense lawyers feel this is important). Third, in (f)(2), the language used refers to a flat “or fixed” fee in recognition of the fact that conscionability factor (c)(9) uses the term “fixed” and because lawyers who use such fee arrangements designate the fees as either “flat” or “fixed.” While (e) should take care of most of the magic words problems, covering both “flat” and “fixed” in (f)(2) seems prudent given that respondents in disciplinary proceedings often base their defense on the actual words used in their fee agreements.

Let me know what you think. Whatever you and Paul decide is fine with me.

Attached:

RRC - 4-200 [1-5] - Rule - DFT13 - ALT Language for Para (f) - DFT1 (06-08-10)RD

- (e) A lawyer shall not make an agreement for, charge, or collect a fee denominated as “earned on receipt,” “non-refundable,” or in similar terms, unless the client simultaneously is advised in writing that the client nevertheless may discharge the lawyer, seek a refund of all or part of the fees charged, or both.
- (f) Subject to the requirements of this Rule, including paragraph (e), a lawyer is permitted to denominate a fee as “earned or receipt” or “non-refundable” in making an agreement for the following types of fee arrangements~~the following fee arrangements are permitted:~~

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/21/2010)**

- (1) a ~~lawyer may charge a~~ true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not as compensation for legal services performed or to be performed. A true retainer must be agreed to in a writing signed by the client.

- (2) a ~~lawyer may charge a~~ flat or fixed fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services.

June 8, 2010 Difuntorum E-mail to KEM, cc Vapnek, McCurdy & Lee:

FYI. See article below re increasing use of "retainers."

Attached:

RRC - 4-200 [1-5] - Retainers Comeback - DJ (06-08-10)

June 8, 2010 Daily Journal Article re Retainers:

DAILY JOURNAL NEWSWIRE ARTICLE

<http://www.dailyjournal.com>

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June 08, 2010

RETAINERS MAKING A COMEBACK

Retainers Are Making a Comeback, Though They May Threaten In-House Attorneys

By Craig Anderson

Daily Journal Staff Writer

PALO ALTO - Law firms and corporations across the state, seeking to cut costs while building longstanding relationships, are experimenting with a billing system that harkens back to the past: the retainer.

The idea, which is growing in popularity even as it encounters resistance from law firms and their corporate clients, is to hire a few law firms to handle all of a company's legal work and then negotiate a monthly fee that covers everything.

Advocates say it saves money and helps reduce tensions between lawyers and clients over traditional hourly billing rates, while allowing outside lawyers to serve as legal advisers on all aspects of a company's legal issues without worrying about the cost.

"It's a true counselor type of role," said Vaughn Bunch, managing partner of the Oaks Technology Group in Goleta and a former attorney at Wilson Sonsini Goodrich & Rosati who specializes in technology transactions.

"If you manage it right, it can actually be more profitable for law firms and makes for better relationships with clients," said I. Neel Chatterjee, a Menlo Park-based partner and top litigator with Orrick, Herrington & Sutcliffe.

Alternative fee arrangements have become increasingly popular, especially as companies look to cut legal costs during the economic downturn. For law firms ranging in size from Orrick to Townsend & Townsend & Crew to Bunch's small Oaks Technology Group, the retainer model is a way to build long-term relationships with clients while keeping a steady stream of business, instead of ending relationships once the work is complete.

The old-style retainer fell out of fashion decades ago as large law firms adopted hourly fees. Meanwhile, in-house legal departments for large companies that needed a wide variety of legal services hired a host of different outside firms.

"The reason it is so foreign is because hourly rates are the metrics that law firms are fascinated with," said Gregory Gilchrist, a San Francisco-based partner at Townsend & Townsend & Crew who is now handling intellectual property enforcement for San Francisco-based Levi Strauss & Co. for a monthly fee.

Skeptics say all of the talk of alternative fee arrangements is a by-product of the recession, and that it threatens a familiar legal system that has worked well both for law firms and in-house legal departments.

If corporate executives like the retainer system too much, in-house legal departments may find their roles minimized or even eliminated, several attorneys said. And even some of its strongest advocates say it does not make sense for many companies or law firms.

"Our model might not work for everyone," said Jennifer Chaloemtiarana, global finance and governance counsel of Levi Strauss. "But it's something all companies should at least visit."

Orrick does all of Levi's commercial and corporate work for a monthly fee, while Townsend supervises all of its intellectual property matters, nearly all of which is enforcing the apparel maker's famous trademark around the world.

Bunch, whose clients are small startup companies, say it often is difficult to get them to make the transition. At first, he said, "they just don't know what I'm talking about."

One client, Irvine-based software company Uniloc USA Inc., was persuaded by Bunch to hire his firm on a monthly retainer instead of paying him by the hour. "He promised us it would always be in our favor," said Michael Lin, the company's chief financial officer.

Bunch already had done the company's contracts in past years, and started working on retainer a couple of months ago.

"When he is on a by-the-hour basis, you are more reluctant to call him up on things," Lin said, noting that the company does not have any in-house counsel. "Now we treat him like he's on salary."

"For Vaughn, I can see the pluses for him because [a monthly retainer] brings predictability and steady cash flow," Lin added. "He's giving us a discount because of the predictability."

Bunch said he likes having regular contact with his clients, instead of being brought in as a hired gun and discarded once the work is done. "This is what I wanted to do from the beginning," he said. "I need that contact."

Some lawyers say the push for such alternate billing arrangements is more of a marketing technique, a way for law firms to show they will be flexible on cost at a time when corporate legal departments are very conscious of the bottom line.

Levi's has already realized lowered legal costs through the firms it has hired, Chaloemtiarana said. "Both firms are able to make it work because they create efficiencies on their own side," she said.

The relative predictability of Levi's legal work makes it a more attractive candidate for a fixed fee arrangement because the company is not in the midst of large-scale, unpredictable litigation, Chaloemtiarana said.

She said the system reminds her of her father's work as a transactional lawyer who negotiated a monthly fee with his clients. Chaloemtiarana said many companies and law firms worry they will do more work, or get fewer services, than they paid for - but said those concerns can be addressed with contractual agreements.

"There might be some months where one side gets a little more, but it all evens out," she said.

Even as corporate legal departments look for ways to cut costs, attorneys are skeptical that monthly retainers will ever replace hourly fees in big-money transactions or high-stakes litigation. Law firms that make huge fees off mergers and acquisitions or initial public offerings, for instance, are unlikely to give that up.

"I cannot see a [big firm] corporate partner going back to something like this," Bunch said, recalling his days at Wilson Sonsini. "They make too much money on the corporate event."

But the retainer system has sparked a lot of curiosity, both among outside law firms and in-house counsel. "Other companies call me all the time interested in it," Chaloemtiarana said.

June 8, 2010 Vapnek E-mail to Difuntorum & KEM, cc McCurdy & Lee:

I read the article this morning. Do these new arrangements fit under true retainers or flat fees? There is a monthly fee for all work in a defined area (or perhaps for all legal work), and there are no further charges. A true retainer is for availability only, with no charges for time, but as I understand the arrangements, the firm is paid a fixed amount monthly and there are no time charges. I guess it's a flat fee for all work required for the month. Should we consider fixing our "definitions" to make certain we cover such arrangements clearly?

June 8, 2010 KEM E-mail to Vapnek, cc Difuntorum, McCurdy & Lee:

I interpret the arrangement as a flat or fixed fee and I don't think we need to change our "definition" of flat or fixed fee.

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/21/2010)**

Paragraph (f)(2) now provides that a lawyer may charge a "flat or fixed fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services."

Whether the fees are charged for completion of a particular task (or tasks) or for services provided during a particular time period, the lawyer is agreeing to provide "specified legal services," the specified services in the kind of fee agreements in the DJ article being whatever legal needs of the client that might arise during the designated time span. I think any attempt to try to include in the rule itself a discussion of a flat/fixed fee based on a covered time period will cause unnecessary confusion with (f)(1), the provision dealing w/ true (i.e., availability) retainers.

If we want to elaborate, we should do it in a comment but I don't think we need to do that either. Our target here is the denomination of a fee as "earned on receipt" or "nonrefundable". No K can include such a statement unless the lawyer complies with paragraph (e). The article is silent on whether the lawyers/law firms are being paid in advance, or whether they are including a clause that the fee is "earned on receipt" or "nonrefundable". I doubt they are, as I can't see a corporate client agreeing to the fee being "nonrefundable". So I would leave our language as it is.

I have some thoughts on the draft language Randy sent earlier today, as well as his e-mail from last night. I'll write you both re that presently.

December 8, 2010 Difuntorum E-mail to KEM, cc Vapnek, McCurdy & Lee:

Here is an alternate formulation of Comment [6A]. Clean version is pasted below. Track changes version is attached. This version deletes some of the repetitive concepts (i.e., striking one of the two separate references to Matthew v. State Bar). It also adds some examples of situations where a client would be entitled to a refund.

Attached:

RRC - 4-200 [1-5] - Rule - Comment [6A] - DFT13.1 (06-08-10)RD - Cf. to DFT13.doc

Clean Version:

[6A] Paragraph (e) prohibits the designation of a fee as "earned on receipt," or as "nonrefundable," or in similar terms unless the required disclosures concerning the client's right to discharge the lawyer and the potential for a refund are made. The unconscionability requirement of paragraph (a) and the application of the factors in paragraph (c) may mean that a client is entitled to a refund of an advance fee payment even though it might have been denominated as "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (e) requires certain minimum disclosures that must be provided to a client in writing. This does not mean the client will always be entitled to a refund, nor does it determine how any refund should be calculated, but merely requires that the client be advised of the possibility of the entitlement to a refund. In addition to the unconscionability of a fee, a client's entitlement to a refund might be based upon: (1) a determination that all or a portion of the fees paid have not been earned; or (2) some other failure of consideration, such as a natural disaster that destroys the lawyer's law office making it impossible for the lawyer to render the agreed upon legal services. The foregoing

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/21/2010)**

examples are not intended to be a comprehensive statement of all possible bases for a client's entitlement to a refund. Although there will always be a potential for a refund, paragraph (e) does not prevent a lawyer from making an agreement for a fee which is earned upon receipt so long as the required disclosures are made in a writing signed by the client. As indicated by case law, however, a client may be entitled to refund notwithstanding the characterization of the fees paid. See, e.g., *Matthew v. State Bar* (1989) 49 Cal.3d 784 [263 Cal.Rptr. 660]; *In re Matter of Lais* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907. While discipline may result from a failure to refund fees, a primary forum for the resolution of fee dispute issues is mandatory fee arbitration under the State Bar Act (see Bus. & Prof. Code §6200 et. seq.) Nothing in this rule is intended to prejudge the outcome of fee arbitration proceedings as this rule, like any law, must be applied to the facts of a particular matter.

Redline Version:

[6A] Paragraph (e) prohibits the designation of a fee as "earned on receipt," or as "nonrefundable," or in similar terms unless the required disclosures concerning the client's right to discharge the lawyer and the potential for a refund are made. ~~A statement in a fee agreement that fees paid are "earned on receipt" or are "nonrefundable" does not abrogate a lawyer's potential obligation to refund all or a portion of a fee to a client. See *Matthew v. State Bar* (1989) 49 Cal.3d 784 [263 Cal.Rptr. 660].~~ The unconscionability requirement of paragraph (a) and the application of the factors in paragraph (c) may mean that a client is entitled to a refund of an advance fee payment even though it might have been denominated as "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (e) requires certain minimum disclosures that must be included in the written fee agreement provided to a client in writing. This does not mean the client will always be entitled to a refund ~~upon early termination of the representation~~, nor does it determine how any refund should be calculated, but merely requires that the client be advised of the possibility of the entitlement to a refund. In addition to the unconscionability of a fee, a client's entitlement to a refund might be based upon: (1) application of the factors set forth in paragraph (c) a determination that all or a portion of the fees paid have not been earned; or (2) some other failure of consideration, such as a natural disaster that destroys the lawyer's law office making it impossible for the lawyer to render the agreed upon legal services. The foregoing examples are not intended to be a comprehensive statement of all possible bases for a client's entitlement to a refund. As such Although there will always be a potential for a refund, paragraph (e) does not prevent a lawyer from making an agreement for a fee which is earned upon receipt so long as the required disclosures are made in a writing signed by the client. ~~Depending on the terms of the specific fee arrangement and other facts, a fee characterized as earned upon receipt may become the property of the lawyer upon receipt.~~ As indicated by case law, however, a client may be entitled to refund notwithstanding the characterization of the fees paid. See, e.g., *Matthew v. State Bar* (1989) 49 Cal.3d 784 [263 Cal.Rptr. 660]; *In re Matter of Lais* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907. While discipline may result from a failure to refund fees, a primary forum for the resolution of fee dispute issues is mandatory fee arbitration under the State Bar Act (see Bus. & Prof. Code §6200 et. seq.) Nothing in this rule is intended to prejudge the outcome of fee arbitration proceedings as this rule, like any law, must be applied to the facts of a particular matter. ~~As a disciplinary standard, paragraph (e) narrowly prohibits the designation of a fee as "earned on receipt" or~~

~~“nonrefundable” because such characterizations oversimplify potentially complex fact bound issues that cannot be resolved by mere reference to the terminology used in a fee agreement.~~

December 8, 2010 KEM E-mail to Difuntorum, cc Vapnek, McCurdy & Lee:

Here's my response to your e-mail from last night:

1. I understand what you are saying but I think that our language in paragraph (f) is wrong in divorcing the "right" to seek a refund from the failure of consideration, etc., that would create that entitlement.
2. Here is what the provision provides:
(e) A lawyer shall not make an agreement for, charge, or collect a fee denominated as “earned on receipt,” “non-refundable,” or in similar terms, unless the client simultaneously is advised in writing that the client nevertheless may discharge the lawyer, seek a refund of all or part of the fees charged, or both.
3. If I were a member of the criminal defense bar, I'd argue that we've have expressly stated that even where the lawyer has performed as promised, the client can seek a refund. The ability to seek a refund is not tied to anything.
4. Bob was correct in noting that the Arizona rule is too narrow in tying the refund to the client's discharge of the lawyer. He revised the Arizona language as follows to permit other terminations of the lawyer-client relationship, whether through the actions of the client, lawyer, or acts of god, to trigger the refund entitlement:

Except as stated in paragraph (f), a lawyer shall not make an agreement for, charge, or collect a fee denominated as “earned on receipt”, “nonrefundable”, or in similar terms unless the client simultaneously is advised in writing that the client nevertheless may discharge the lawyer, and that any termination of the lawyer-client relationship before the completion of the lawyer's agreed services may entitle the client to a refund of all or part of the fee based on the value of the lawyer's services.
5. I understand the concern with Bob' use of the "completion of the lawyer's agreed services" language. But the Commission has gone in an entirely different direction by divorcing the failure of consideration concept from the entitlement to seek a refund. In fact, the Commission has removed any mention of entitlement in the black letter and simply notes that the client "may ... seek a refund". That is pretty weak, but it also creates a flash point for the criminal bar as I've noted earlier.
6. All that I am arguing is that we should reintroduce SOME idea that although the client does not have an unbridled right to receive a refund, the client may be entitled to a refund under certain circumstances. In fact, the Commission directed the drafters to include some concept of "depending on the circumstances" in paragraph (e). Instead, I tried to do it in Comment [6A] because I was at a loss how to do it in the construction the Commission approved at the last meeting (i.e., L must inform the client that the client may do A, B, or both.) The problem is that the client's right to discharge the lawyer does not depend on the circumstances, but the client's entitlement to a refund does. Within the construction approved by the Commission, however, it is impossible to communicate that.

7. Here is an alternative:

(e) A lawyer shall not make an agreement for, charge, or collect a fee denominated as “earned on receipt,” “non-refundable,” or in similar terms, unless the client simultaneously is advised in writing that the client nevertheless may discharge the lawyer at any time and, based upon the application of the factors enumerated in paragraph (c), the client may be entitled to seek a refund of all or part of the fees charged, ~~or both.~~

I've added the phrase "at any time," which is from the Arizona rule and which more accurately reflects the rule of *Fracasse v. Brent*. I've then tried to be a bit more specific than the amorphous "depending upon the circumstances" in identifying when the client might be entitled to a refund. I've also added the "entitled" language which goes further than the weak statement, "may seek". Again, Comment [6A] clarifies that the client is not automatically entitled to a refund, just that the client may be.

8. My focus has been on paragraph (e) because that is where I think the client protection comes in, i.e., in what the lawyer must advise the client in the fee agreement. That is necessary because we are permitting lawyers to claim a fee is nonrefundable only if they also explain to the client that the client has certain rights (discharge) and may, depending upon a balancing of factors based on what actually occurs, may also be entitled to a refund. This sounds a lot like saying "its nonrefundable unless it is not," but I don't see any way around it.

June 8, 2010 KEM E-mail to Difuntorum, cc Vapnek, McCurdy & Lee:

1. Our comments have been passing in cyberspace. Perhaps we can all get together on a brief phone conference in an attempt to nail this down. I can be available anytime today. I have some errands to run but can easily work around your schedules.

2. My "only" comment this e-mail concerns paragraph (f)(2). I think we need to a a written fee K requirement in (f)(2) as we have in (f)(1).

3. First, I agree with Randy's revisions to the introduction to paragraph. However, it starkly demonstrates the need to include a writing requirement. In essence, in the introduction we are stating that L's can denominate a flat/fixed fee as nonrefundable or earned on receipt if they comply with (e) and the rest of the rule. We are not referring to all flat/fixed fees; just those that make a claim that the fee is nonrefundable or earned on receipt.

a. When Jerry used his example of "scale," at the meeting by referring to a \$500 flat fee K for a will, no one picked up on the fact that we are not concerned w/ ALL flat or fixed fee K's, only those that claim to be "earned on receipt" or "nonrefundable." I don't think that Estates lawyers claim their flat fees are nonrefundable (do they?) We won't be reaching those small denomination (\$\$) fee K's unless they claim the fee to be nonrefundable. If they do, I see no reason why we should distinguish them from any other flat fee. Therefore, we need to add the writing requirement to (f)(2) as well.

4. Therefore, I recommend adding the following sentence:

A flat or fixed fee agreement that denominates the fee as "earned on receipt" or "nonrefundable" must be agreed to in a writing signed by the client.

June 8, 2010 KEM E-mail to Difuntorum, cc Vapnek, McCurdy & Lee:

I don't think I replied to your earlier e-mail re Comment [6A]. I like what you have done. I have some suggested revisions that are highlighted in yellow in the attached document.

I've also suggested that, depending upon whether you and Paul agree with me that (f)(2) should require an express requirement of a written fee K signed by the client (see my earlier e-mail), we should use either the bracketed ALT-A or the bracketed ALT-B clauses, both of which are also highlighted in yellow.

Attached:

RRC - 4-200 [1-5] - Rule - Comment [6A] - DFT13.2 (06-08-10)RD-KEM - Cf. to DFT13.doc

June 8, 2010 Difuntorum E-mail to KEM, cc Vapnek, McCurdy & Lee:

I agree that a writing requirement would be desirable for (f)(2) since it looks really odd that a true retainer must be in writing under penalty of discipline but a flat fee paid in advance does not. However, I believe this precise motion was voted down based on Jerry's and Ellen's arguments against a disciplinable writing requirement for flat fees. (Stan and Allen supported a writing requirement and so did I.)

June 8, 2010 Difuntorum E-mail to KEM, cc Vapnek, McCurdy & Lee:

Thanks Kevin. Your edits work for me. Don't know what would happen with a writing requirement for flat fees if it comes back for a vote at the next meeting. Dom and Mark will be back but they might cancel each other out.

June 8, 2010 KEM E-mail to Difuntorum, cc Vapnek, McCurdy & Lee:

I don't think the Commission was properly focused on what was at issue at the meeting. Jerry referred to flat fee K's in general, not flat fee K's that claim to be nonrefundable or earned on receipt. That was the point of my discussion in my point #3, below. The problem is starkly presented by your revisions to the introductory paragraph of (f):

(f) Subject to the requirements of this Rule, including paragraph (e), **a lawyer is permitted to denominate** a fee as "earned or receipt" or "non-refundable" in making an agreement for the following types of fee arrangements (emphasis added).

At our meeting, there was no introductory paragraph. Even in your Draft 12.3, all it state was "Notwithstanding paragraph (e), the following arrangements are permitted," and it included the writing requirement. Now, however, we have a provision that expressly permits lawyers to state that a fee is "earned on receipt" or "nonrefundable," but we are not requiring a writing. It wasn't until I read your introduction to (f) that I changed my mind on this point. Your introduction starkly points out that we are only talking about flat fee K's that make such a claim; other flat fee K's that do not make a claim of nonrefundability or earned on receipt (e.g., for a will?) are not subject to paragraph (f) and need not be in writing. However, I don't think that it is asking too much for any lawyer who claims a non-refundable or earned-on-receipt fee to put it in a writing signed by the client -- even if the total fee is only for \$500.

I think it important that we bring at least this one issue back to the Commission for reconsideration.

June 8, 2010 Vapnek E-mail to Difuntorum & KEM, cc McCurdy & Lee:

That should work. I have a meeting at noon, so we can go at it for an hour only. I have been reading our exchanges for the past hour or so; I agree that we should restore the writing requirement in (f)(2).

I'm not so sure about the factors in (c) being appropriate for a determination of any refund. Why don't we just say something like: "...based on the value of the lawyer's services that had been provided." That way, the lawyer could claim that the services provided were worth the total fee that was paid, and would have to prove it, and the client would do the opposite.

I may have more in the a.m., before we speak.

June 9, 2010 Difuntorum E-mail to Vapnek & KEM, cc McCurdy & Lee:

Here's the call-in information for today's teleconference at 11:00 am:

DIAL-IN #: 1-888-659-6007
PASSCODE #: 714511

June 9, 2010 Difuntorum E-mail to KEM, cc Vapnek, McCurdy & Lee:

The one Commission member that I am absolutely certain was on the same page as me was Ellen. During the discussion, I started to say that there were two options for a writing requirement policy decision: either all nonrefundable flat fees must be in writing; or only nonrefundable flat fees paid in advance must be in writing. Ellen expanded on my comment and said that she believed the Commission should consider two additional options (for a total of four), namely, all flat fees must be in writing and no flat fees must be in writing. She then advocated for the no flat fees must be in writing policy and her view prevailed.

I think a writing requirement can be brought back to the Commission for reconsideration but I think Paul should speak with Ellen in advance to mitigate any complaints that the Commission should not spend valuable time on this issue because it was already asked and answered.

My personal view is that any flat fee writing requirement should parallel the true retainer writing requirement. Thus, if the true retainer writing requirement covers all nonrefundable true retainers (even those not paid in advance), then that should be the standard for flat fees. If a different flat fee writing requirement is desired, then the true retainer requirement should be conformed to that standard. I think differing polices would be hard to explain or justify.

June 9, 2010 KEM E-mail to Difuntorum, cc Vapnek, McCurdy & Lee:

As you recount what Ellen said, I recall her statements. However, my point still stands: The Commission was not focused on precisely what was at the issue -- i.e., that the writing requirement would be limited to flat fee K's that purport to be non-refundable or earned on

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/21/2010)**

receipt. That is the only slice of the flat/fixed fee universe that we want to regulate with paragraphs (e) and (f). I agree that not all flat fee K's need be in writing. There is no problem with other flat/fixed fees because they do not include the characterization/misleading statement of a not-yet-earned-fee as "earned on receipt" or "nonrefundable". All that I am asking is that we bring this back to the Commission to confirm that they understood precisely what they were voting on. To require true retainer fees to be in writing but not to require flat fee K's w/ the foregoing misleading statements doesn't make any sense to me. If someone wants to include "nonrefundable" or "earned on receipt" language in a \$500 flat fee K, then it should be in writing, signed by the client.

In effect, I am arguing that the precise question was not asked and answered.

Finally, when the vote was taken, the Commission did not have before it the introductory language you added to paragraph (f), which makes it abundantly clear that we are permitting lawyers to put the misleading language in the flat fee K. That's what set me off on this recommendation; before you added that language, I was fine w/ not requiring flat fee K's to be in writing. I think that most Commission members, were they to see how paragraph (f) is now drafted, would like to revisit the vote.

June 9, 2010 KEM E-mail to Vapnek & Difuntorum, cc McCurdy & Lee:

I've created a new Draft 13.2 (6/9/10), compared to Draft 11, the public comment draft. The attached incorporates the revisions to (e) and (f) that Randy and I have suggested, as well as the revised Comment [6A], as revised by Randy and me. I've highlighted in turquoise those parts of the draft that differ from Draft 13, which I circulated on Monday, 6/7/10.

Please note that I now agree with Randy that we should not try to make any further changes to paragraph (e), but instead rely on Comment [6A] for clarification.

Please also note that I still believe we should request reconsideration of the Commission's vote on not requiring a written fee K for flat/fix fee K's that purport to be non-refundable or earned on receipt. The language Randy has added to the introductory paragraph of (f) limits the provision's application to those kinds of flat fee K's.

I look forward to discussing this further at 11.

Attached:

RRC - 4-200 [1-5] - DFT13.2 (06-09-10) - Cf. to PCD [11] (12-14-09) - LAND.doc

P.S. There is no Draft 13.1; I named the attached 13.2 to conform to the Draft 13.2 assigned to the last version of proposed Comment [6A] that Randy and I exchange yesterday.

June 9, 2010 Difuntorum E-mail to KEM, cc Vapnek, McCurdy & Lee:

Assuming Commission agreement with the recommendation to add a writing requirement for flat fees denominated as "nonrefundable" or "earned on receipt," here is one possible change to (f)(1) to conform it to (f)(2):

- (1) ~~a lawyer may charge~~ a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified

matter, ~~in addition to and apart from any but not as~~ compensation for legal services performed ~~or to be performed~~. A true retainer that denominates the fee as “earned on receipt” or “nonrefundable” must be agreed to in a writing signed by the client. ~~Unless otherwise agreed, a true retainer is the lawyer’s property on receipt.~~

Does this seem right?

June 9, 2010 KEM E-mail to Difuntorum, cc Vapnek, McCurdy & Lee:

That change works for me.

June 9, 2010 KEM E-mail to Difuntorum, cc Vapnek, McCurdy & Lee:

I've attached Draft 13.3 (9/9/10) of the Rule, revised per our telephone conference of a few minutes ago. Please let me know if you have any questions.

Attached:

RRC - 4-200 [1-5] - DFT13.3 (06-09-10) - Cf. to PCD [11] (12-14-09) - LAND.doc

June 9, 2010 Difuntorum E-mail to Martinez, Kehr, Peck, Sondheim, cc Staff:

Attached is the latest version of proposed Rule 1.5. This is only the current working draft. It has been given an okay by Paul, who is the lead drafter, and Kevin and I concur in the draft, but that's about it.

One of the registrants anticipated to speak at the public hearing tomorrow is Barry Tarlow (see attached list of registrants). We might take the opportunity to offer him a sense of the Commission's direction on Rule 1.5 following the Commission's preliminary review of the comments received at its June 4th meeting. However, because the draft is not yet finalized, Harry and I do not believe that we should share it with Mr. Tarlow. But, you should have it for reference purposes.

Attached:

RRC - 4-200 [1-5] - DFT13.3 (06-09-10) - Cf. to PCD [11] (12-14-09) - LAND.doc

RRC - PubCom - 06-10-10 Public Hearing - Attendees - DFT1 (06-09-10).pdf

June 9, 2010 Martinez E-mail to Difuntorum, cc Kehr, Peck, Sondheim & Staff:

Randy, it was not my understanding that the Commission voted to tinker with (f) dealing with true retainers. The issue re true retainers is not that they are denominated as nonrefundable or earned on receipt. I would leave the true retainer issue alone. Labels don't matter as long as it's a true retainer. So I would not mix the two concepts.

As for the language in (e), is it ok to charge a nonrefundable retainer as long as the fee is not denominated as “earned on receipt” or “non-refundable”? Therefore are we using the wrong approach in (e) by regulating labels rather than substance?

The problem with (e) is still that it sends inconsistent messages: The retainer can state that the fee is nonrefundable and at the same time that the client may seek a refund. This will only confuse clients, not to mention lawyers. While we could state that there may be circumstances where the fee may be refunded, that begs the question as to what those circumstances are? So the answer is to either permit or prohibit nonrefundable fees, rather than regulate the labels or language employed. It seems to me that the "labels" approach we have adopted avoids confronting the real issue which is more substantive.

June 10, 2010 McCurdy E-mail to Vapnek, cc Chair, Vice-Chairs & Staff:

Paul,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

ASSIGNMENT SUBMISSION DEADLINE: The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synthesizing all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/21/2010)**

Because the comment period deadline of June 15th has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15th comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

LIST OF ASSIGNED RULES (As explained above, these are rules that presently have received a comment in opposition or a comment stating an “Agree if Modified” position):

- 1.5 (Agenda Item III.G)
- 6.4 (Agenda Item III.KKK)
- 6.5 (Agenda Item III.LLL)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

www.calbar.org/proposedrules

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

Attached:

- RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - VAPNEK - DFT1 (06-09-10).pdf
- RRC - 1-650 [6-5] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [6-4] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 4-200 [1-5] - Public Comment Chart - By Commenter - XDFT1 (04-22-10)2.doc
- RRC - [6-4] - Rule - PCD [4] (12-13-09) - CLEAN-LAND.pdf
- RRC - [6-4] - Rule - PCD [4] (12-13-09) - CLEAN-LAND.doc
- RRC - 4-200 [1-5] - Rule - PCD [11] (12-14-09) - CLEAN-LAND.pdf
- RRC - 4-200 [1-5] - Rule - PCD [11] (12-14-09) - CLEAN-LAND.doc
- RRC - 1-650 [6-5] - Rule - PCD [5] (04-01-10) - CLEAN-LAND.pdf
- RRC - 1-650 [6-5] - Rule - PCD [5] (04-01-10) - CLEAN-LAND.doc

June 10, 2010 Sondheim E-mail to RRC re June 25-26, 2010 Agenda:

Since I am going out of town this Saturday until June 24 with 2 of my grandchildren and will not have time to send e-mails regarding the proposed RRC responses to comments on our rules (including oral comments we heard today) as I will be busy taking care of these grandchildren, I want to send a few thoughts on some of the comments or rules based upon a quick review of what we have received and heard so far.

Rule 1.4

While this is not based upon a comment, in reviewing this rule it seemed to me that there may be an inconsistency between (c)(2) and comment 6.

Rule 1.8.1

The COPRAC comment appears to me to be a clarification of our intent.

Rule 3.4

While I realize that most, if not all, of the SDCBA comments are reiterations of what was submitted before, I think further consideration should be given to Comment 1 regarding (e) (3).

Rule 6.3

We should give further consideration to what we mean by "legal service organization." Do we mean just those organizations covered by B&P section 6213? If so, then we should make a reference to 6213. I have asked Toby Rothschild to give this matter some thought and he may be sending an email regarding his views.

Based upon the oral testimony we heard today, I have the following observations:

Rule 1.5

It is my understanding that Barry Tarlow believes that "non-refundable" and "earned on receipt" language is useful in avoiding forfeiture, seizure, etc. of the attorney's fee and that if this language is permitted, he would not be adverse to requiring the fee agreement to state that the client "may or may not be entitled to a refund." I would suggest that consideration be given to this type of language, rather than our proposed disclosure regarding seeking a return of the fee. As to the disclosure that the client can terminate the representation, it was my understanding that he believes this language would create a greater risk that the fee may be forfeited, seized, etc. He pointed out that this language is not required by our proposed rules in other types of fee agreements. We can discuss this further at the meeting.

Rule 6.1

Toby pointed out that we deleted the last sentence of ABA comment 4 and suggested that the sentence be retained as it makes it clear that the attorney's fees can be donated when the matter has been referred to someone willing to do pro bono work. At least one other speaker supported this view. We may want to reconsider this deletion.

June 11, 2010 Difuntorum E-mail to RRC:

Regarding Rule 1.5, Barry Tarlow also indicated that he would not object to a provision in the rule requiring a flat fee arrangement to be in writing (under penalty of discipline), but that there should be exceptions, like the B&P Code written fee agreement provisions, for certain situations such as an emergency.

June 11, 2010 Sapiro E-mail to RRC:

As I said at our last meeting, I think there also should be a small case exception. For example, if the flat fee is \$1,000 or less, why require a 7 page engagement agreement?

June 15, 2010 Difuntorum E-mail to RRC:

Commission Members:

More public comments keep arriving. Here's another one that you can begin addressing. It is from the State Bar Law Practice Management and Technology Section. The 9 rules addressed in the letter and the responsible lead drafters and codrafters are listed below. As previously emphasized, the question we need you to answer by the assignment deadline is whether the codrafters will be recommending rule revisions in response to the public comments received. Rules for which there are no recommended revisions will be placed on consent. –Randy D.

1.1 = VAPNEK (Peck, Ruvolo)
1.5 = VAPNEK (Ruvolo)
1.16 = KEHR (Foy, Melchior)
5.1 = TUFT (Martinez, Peck)
4.4 = MARTINEZ/TUFT
7.3 = MOHR (Julien, Ruvolo)
8.3 = KEHR (Peck, Tuft, Vapnek)
8.4.1 = PECK (Martinez)
8.5 = MELCHIOR (Lampert, Peck)

Attached:

RRC - 1-400 [7-3] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - [4-4] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-310X [5-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 3-700 [1-16] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 3-110 [1-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 4-200 [1-5] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-100 [8-5] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 2-400 [8-4-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-120 [8-3] - 06-15-10 LPMT [Hoffman] Comment.pdf

June 16, 2010 Difuntorum E-mail to RRC:

Commission Members:

More public comments keep arriving. Here's another one that you can begin addressing. It is from HALT (an actual non-lawyer public interest group). There are 5 rules addressed in the letter but HALT supports 3 rules (1.8.10, 1.4.1, and 1.2), so only the 2 rules listed below require attention. As previously emphasized, the question we need you to answer by the assignment deadline is whether the codrafters will be recommending rule revisions in response to the public comments received. Rules for which there are no recommended revisions will be placed on consent. –Randy D.

1.5 = VAPNEK (Ruvolo)
1.4 = RUVOLO (Julien)

Attached:

RRC - 3-410 [1-4-1] - 06-14-10 HALT Comment.pdf
RRC - 3-500 [1-4] - 06-14-10 HALT Comment.pdf
RRC - 3-210 [1-2] - 06-14-10 HALT Comment.pdf

RRC - 3-120 [1-8-10] - 06-14-10 HALT Comment.pdf
RRC - 4=200 [1-5] - 06-14-10 HALT Comment.pdf

June 16, 2010 McCurdy E-mail to Vapnek, cc Chair, Vice-Chairs & Staff:

Paul,

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentsrrc/byrule>).

1.1 (Agenda Item III.C) 4 Comments: **Balin/Dilworth (attached)**; OCTC; Law Practice Management & Technology Section; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

1.5 (Agenda Item III.G) – 5 Comments: **LA Public Defender-Michael Judge (attached)**; OCTC; Law Practice Management & Technology Section; Zitrin/Law Professors; and, HALT (sent with Randy's 6/15/10 e-mail)

1.8.8 (Agenda Item III.R) - OCTC (sent with Randy's 6/15/10 e-mail)

6.4 (Agenda Item III.KKK) - OCTC (sent with Randy's 6/15/10 e-mail)

6.5 (Agenda Item III.LLL) - OCTC (sent with Randy's 6/15/10 e-mail)

8.4 (Agenda Item III.WWW) Co-Lead w/Peck – 2 Comments: OCTC; and, DOJ (sent with Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - 4-200 [1-5] - 06-14-10 LAPD (Judge) Comment.pdf

June 16, 2010 Vapnek E-mail to McCurdy, cc Sondheim, Co-Drafters (Tuft, Peck, Ruvolo, Kehr, Martinez, Lamport, Sapiro), Difuntorum & KEM re Rules 1.1, 1.5, 1.8.8, 6.4, 6.5, 8.4:

Pardon the massive email, but there was little time to review all the comments, figure out what they were saying, and then trying to figure out if any warranted any changes in the proposed rule. My lead assignment was for the following rules: 1.1, 1.5, 1.8.8, 2.3, 3.2, 6.4, 6.5, and 8.4. There was no time that I had within which I could consult with my co-drafters, so I take full

responsibility if anyone disagrees with me. The only rule change that should be discussed is the proposed changes to rule 1.5 that Randy, Kevin and I have been working on post our last meeting. I have tried to review all the comments that have been made, but none persuade me that we should propose any modification of any RULE except for 1.5. There may very well be some proposed changes to some of the comments, but I understand that these will be done between now and the next meeting on the 25th.

June 19, 2010 Kehr E-mail to RRC:

I have drafting suggestions, none of which is intended to alter the substance (although I do not support paragraph (f)(2)). My suggestions were triggered in part by the Drafters' recommendation in n. 7 that the written fee agreement requirement of (f)(1) be extended to (f)(2). As drafted, this results in the repetition of language that could be stated once to apply to both subparagraphs. More importantly, paragraph (f) says that it is subject to the requirements of paragraph (e), but paragraph (e) does not say that non-refundable fees are limited to the instances identified in paragraph (f). Thus, paragraph (e) appears to be complete in itself, and to say that a lawyer may enter into a non-refundable fee agreement in any situation so long as the paragraph (e) written notice is given. A reader who stops at the end of paragraph (e) – as some readers surely will – would have not idea of the paragraph (f) limitations. It also seems that the current draft does not dictate the normal sequence of disclosure preceding consent. My suggestion is to change (e) to say:

When permitted by paragraph (f), a lawyer shall not ~~may~~ make an agreement for, charge, or collect a fee that is denominated as “earned on receipt” or “non-refundable”, or in similar terms, ~~unless~~ but only if the client ~~simultaneously~~ is advised in writing that the client nevertheless may discharge the lawyer at any time, and may seek a refund of all or part of the fees charge, or both and the client then agrees to the arrangement in a writing signed by the client.

This would permit us to remove the last sentence of (f)(1) and (2). I also would underline the exclusivity of the paragraph (f) exceptions by inserting “only” as the second word of the fourth line so that it says: “... **only** in making an agreement for the following types of fee arrangements:”

I notice that “non-refundable” is spelled with the hyphen in (e) but without one in (f).

I also ask that we discuss ¶4 in the OCTC comments. It says that there is a conflict between the Rule 1.0.1(d) definition of fraud (which includes “fraudulent under the law of the applicable jurisdiction”) and the *Herrscher* standard (which is that there must only an **element** of fraud or overreaching). The exact quote from *Herrscher* is:

In the few cases where discipline has been enforced against an attorney for charging excessive fees, there has usually been present some element of fraud or overreaching on the attorney's part, or failure on the attorney's part to disclose the true facts, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds under the guise of retaining them as fees (citations omitted) 4 Cal.2d at 403

I think that OCTC is right that the 1.0.1 definition could suggest a substantial narrowing of the *Herrscher* standard. I suggest that we conform the paragraph (b) language to *Herrscher*, which could be done as follows:

~~... ; or if the fee would amount to an improper appropriation of the client's funds because there has been an element of fraud or overreaching by if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, or the lawyer has failed to disclose the true facts so that the fee charged, under the circumstances, constitutes or would constitute in improper appropriation of the client's funds.~~

June 21, 2010 KEM E-mail to McCurdy, cc Difuntorum & Lee:

As requested, I've attached XDFT2.1 (6/20/10) of the public comment chart for 1.5. I've summarized all the comments received through 6/18/10 (I downloaded the complete public comment chart PDF from the public comment web site on Saturday). I've also added the public comment of Walter Pyle, whose comment was inadvertently placed in the 6.1 complete public comment (so we'll have to move his comment from the 6.1 PDF to the 1.5 PDF). I still haven't completed the response to most of the submissions because I need to discuss them with Paul. It is possible we won't be able to complete the responses until after this week's meeting.

A few notes/questions:

1. The Paulsen and SDCBA responses are fine and should remain the same.
2. Mark Borden submitted three comments, apparently two individually as letters, and the other apparently on behalf of the Tuolumne Co. Bar Association (simply used the form, w/o comment). However, it is not clear that he submitted the latter comment on behalf of the Bar Association. I ask that Randy take a look at it to see if he agrees it was submitted for the bar association.
3. Did COPRAC submit a comment on 1.5? I would have thought they would have but there is no comment from them in the PDF at the public comment web site.

Please let me know if you have any questions.

Attached:

RRC - 4-200 [1-5] - Public Comment Chart - By Commenter - XDFT2.1 (06-20-10)KEM.doc

June 21, 2010 Lee E-mail to KEM:

COPRAC did not comment on 1.5. They listened in on the last meeting's changes to 1.5 and they decided to not comment on the public comment draft version since it is being revised significantly.

June 21, 2010 McCurdy E-mail to Vapnek, cc Chair, Vice-Chairs & Staff:

Paul,

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/21/2010)**

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

Attached:

RRC - 3-400 [1-8-8] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 4-200 [1-5] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10)KEM.doc
RRC - [6-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-120X [8-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-650 [6-5] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc
RRC - 3-110 [1-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

June 21, 2010 Sapiro E-mail to RRC List:

1. I, too, was troubled by the proposed wording of paragraphs (e) and (f). I think Bob has recommended an excellent change. It is better than what I was working on.
2. However, I would not put the word “only” where Bob suggested it. I think the word “only” should appear in the third line of proposed paragraph (f) at page 14 of the agenda materials, after the phrase “a lawyer is” and before the word “permitted.”
3. Another alternative is, at the same line, change the wording to “. . . a lawyer shall only denominate a fee. . . .”

June 22, 2010 Vapnek E-mail to McCurdy, cc Chair, Vice-Chairs & Staff:

Because the comments on 1.5 are so voluminous, I cannot meet the deadline if I enter the comments on the chart. Here are my proposed comments that will apply to most of the commenters:

For all the criminal law complainers: The comments demonstrate a profound misunderstanding of current, long-standing, California law. No matter what a lawyer may call the fees, if the lawyer does not provide the services agreed upon, the unearned portion of the fees must be returned to the client. The Commission's proposed rule thus confirms current law, but clarifies the circumstances under which a lawyer may denominate the fee as "non-refundable" or "earned upon receipt," and requires a writing, signed by the client in such circumstances. This is for client protection, not lawyer convenience.

For those who complain about lack of notice (numbers 12, 30, 17, and 43), repeat what was written in response to Nanci Clarence (#24 on page ??): The proposal was issued for a 90-day

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public comment period posted on the State Bar website and was also the subject of a public hearing in Sacramento that was noticed by several methods, including a posting on the State Bar website; public notices in the Daily Journal, the Daily Recorder, and the Sacramento Bee; email notifications to approximately 14,000 interested persons; and a press release to the media.

In response to #53 on page 42 of the comments: The Commission believes that retaining the present unconscionable fee standard is appropriate for disciplinary purposes in contrast to the reasonable standard of the ABA Model Rules. The latter is more suited to a fee dispute regime.

In response to #46 (Carol Langford): 1st para. No comment necessary; 2d para.: The Commission believes that "adverse" in the circumstances of the proposed rule can be well understood and is not unclear. 3d para. No comment necessary.

In response to #56 (page 60): Proposed Rule 1.5 is not intended to address any alternative fee arrangements, only very specific ones that might be labeled non-refundable or earned upon receipt.

In response to #57 (OCTC page 76): para. 1. same as #53 above; para. 2 and 3. The Commission believes that the current factors in rule 4-200 appear to be sufficiently encompassing. Para. 4. The Commission believes that its proposed language is consistent with case law. Para 5 & 6: no comments necessary

In #25 (Bradley Paulsen page 87), and #14 (San Diego Bar Assn page 92), the proposed comments are fine.

In #60 (Zitrin page 102) same response as #53 above.

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

TOTAL = 64 Agree = 0
Disagree = 58
Modify = 4
NI = 2

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
12	Arguedas, Cassman & Headley, LLP	D	No	1.5(e)(2)	<p>We are unaware of any pattern of attorneys abusing non-refundable fees to bilk their clients. Such misconduct is barred by already-existing rules, such as current Rule 4-200, which prohibits attorneys from charging or collecting unconscionable fees.</p> <p>Exception (e)(1) to the Proposed Rule purports to permit a “true retainer” fee to “ensure the lawyer’s availability to the client.” But the Proposed Rule would prohibit an agreement under which the retainer would constitute a minimum fee that ensures the attorney’s availability yet also serves as a credit against which the attorney charges her time until the fee is exhausted. Such arrangements are common and benefit both the client and the attorney.</p> <p>Proposed Rule 1.5(e)(2) purports to permit “flat fee” agreements under which the fee becomes the property of the attorney upon receipt, but the Rule will in fact make such arrangements impossible. Subsection (e)(2) requires a written agreement that states, among other things, “that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.” This is a contradiction – the fee cannot be the lawyer’s property upon receipt if it is also potentially refundable.</p>	<p>To address the commenter’s concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer’s property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer’s property immediately on receipt; (iv) that the fee agreement does not alter the client’s right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.5 Fees for Legal Services.
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					<p>The Proposed Rule would essentially bar flat fee arrangements by placing all the risk on the attorney – under the Proposed Rule, if the case requires less work than anticipated at the time of the agreement, the attorney will be required to refund a portion of the fee, but if the case requires more work, the attorney will be stuck with the flat fee. Few attorneys will enter into such an arrangement.</p> <p>It is a matter of concern that the Proposed Rule has proceeded this far toward approval without proper notification to the Bar's membership. Many attorneys and organizations opposed previous efforts to make similar amendments to the rules governing non-refundable fees, yet this Proposed Rule was conditionally approved by the Board of Governors without any meaningful opportunity for public comment. This procedure seems to violate the terms of Rule of the State Bar 1.10, and in any case is not advisable when, as here, the proposal at issue is likely to be the subject of significant controversy.</p>	
27	Ash, Jon	D	No	1.5(e)(2)	<p>I have been a licensed attorney since 1972. My practice has been limited to criminal defense. For the past 38 years, I have been charging a flat fee service based on my experience in dealing with every type of criminal offense.</p> <p>I have found, over the years, that my clients would much rather know, up front, what the handling of a case is going to cost. If my fees aren't acceptable to</p>	

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					<p>them, I can always refer them to an attorney that might charge less. If the handling of a case takes much less time than anticipated, I have the ability to refund fees if I wish. In all my years, I might have had one or two clients, out of hundreds, who have asked for any type of refund.</p> <p>It's been my experience most criminal defense attorneys in California charge a flat fee. Not only does a client feel more assured knowing what the fees are going to be, I believe an all inclusive fee encourages more attorney-client contact. I tell my clients to call with any problem or question. This approach promotes better trust; the client knows I'm not encouraging contact so I can bill for an extra 15 minutes.</p> <p>My primary practice is now in Oregon. I've been practicing in Bend since 1993. A lot of criminal defense attorneys in Oregon charge by the hour and I've heard many complaints from clients regarding that approach. Clients feel they are being "nickel and dimed" to death and appreciate the flat fee approach. I constantly hear that their attorney is "dragging the case out" just to charge additional hourly fees. If an attorney is too expensive, clients won't hire them. Fee arbitration is always an option if a client is really taken advantage of. Clients are usually looking for results. If they get the result they want for a set amount of money, they are happy. Curtailing the flat fee would be a mistake.</p>	

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51	Avola, Melyssa	D	No	1.5(e)(2)	Proposed New Rule of Professional Conduct, Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers would radically alter the way the majority of the Criminal Defense Bar does business. "Flat Fees" or "Fixed Retainers" are a common, and accepted way to retain clients in need of a criminal defense attorney. Such a practice keeps fees low to accommodate clients that may not be financially able to pay for accrued hourly fees and costs. Please refer to the attached letter from the President of CACJ Board of Governors, Ann C. Moorman for more information.	
33	Ball, Scott	D	No	1.5(e)(2)	This is simply untenable and would have a profound negative effect on the practice of law in the area of criminal defense, as well as other areas of law as well. Flat fee, non-refundable retainers enable attorneys to take cases where it is impossible at the outset to know the amount of work that will be necessary. When we take a case, we agree that we will not ask for additional funds when the work necessary is greater than anticipated - and to be able to make that guarantee it has to work both ways.	
55	Berman, Richard P.	D	No	1.5(e)(2)	The new proposed State Bar Rule 1.5(e)(4-200) to prohibit non-refundable retainers is an anti-consumer measure. I have been practicing criminal law, both as a prosecutor and a defense attorney, for almost 40 years. During that time I have won numerous awards and received the highest possible peer ratings and	

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					<p>reviews. it is unfair to the public to prohibit them from negotiating a reasonable and fair price for my services. In America, competition and the free market are hallmarks of our success. If a consumer wants to pay for my years of experience, track record of success, thousands of hours of post-law school education, reputation and expertise, they should be free to do so .</p> <p>If I could not charge a significant non-refundable retainer, I would be likely forced to charge an hourly fee which could not be reflective of my past accomplishments and experience in relationship to a relatively new and unproven attorney. If the new attorney is charging the "going rate" of \$250.00 to \$350.00 per hour, I would have to charge many times that amount per hour to reasonably value my services. Simply put, a large non-refundable retainer paid to me may provide the results and the piece of mind that a new attorney may never be able to provide, and do so with a fair and reasonable cost to the client.</p> <p>Anyone who has dealt with a person charged with a serious crime, or their family, knows the stress that a criminal prosecution visits upon a defendant and his/her family. If I can save a person's liberty, reputation, life savings, and professional license, and do so in an expeditious manner that does not force him/her and the family to go through protracted proceedings, then the consumer has enjoyed the freedom to hire the lawyer they desire at the price that</p>	

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					they are free to negotiate and to enjoy the results, of the many thousands of clients I have represented the complaints about the fees can be counted on the fingers of one hand. That is in almost 40 years of handling both serious and mundane criminal matters and charging what I and the client feel is fair and reasonable, I simply cannot provide such services under the new proposed state Bar Rule. Both the public and I will lose a great deal if this measure is passed.	
50	Bermant, Alison	D	No	1.5(e)(2)	<p>I have been practicing criminal defense law for 11 years now; eight years in private practice after working as a public defender. To have the State Bar suddenly involved in my fee contracts with my clients is very disturbing. 100% of the time that I have allowed clients to make payments to me for work performed, I have not been paid.</p> <p>There are no exceptions to this. My experience is such that if I am not paid in full prior to the making of the first court appearance, I will not be paid. Once a case is resolved, the client no longer has any interest in keeping his or her obligations to me because they are either incarcerated or so focused on paying court fines and reporting to their probation or parole officer that it is not on their agenda to see that the lawyer who helped them gets paid.</p> <p>Every criminal lawyer I have ever come in contact with works on a flat fee basis for this very reason. In some</p>	

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					<p>cases, when a client insists on me working for an hourly rate, I will do so. Generally I end up charging them significantly more because of the amount of time I spend on the phone dealing with my client's emotional issues over being prosecuted for their crimes. Flat rate fees in criminal cases are the only way to assure an attorney gets paid.</p> <p>While many people believe that criminal lawyers are getting rich and some sort of windfall by this agreement, I am here to tell you that there are so few Johnny Cochrans in this world. I still love month to month most times. I have been out of law school for 11 years and every single month have made significant law student loan payments (still am). Not being paid for my work eventually means I go out of business. That is my reality.</p> <p>I vehemently oppose any modifications to the way I conduct my business. I'm happy to come down and discuss this in person as well so you understand what real life is really about.</p>	
3	Beverly Hills Bar Association	D	Yes	1.5(e)	<p>We write in opposition to subdivision (e) of the Proposed New Rule of Professional Conduct 1.5, "Fees for Legal Services." Subdivision (e) would subject lawyers to professional discipline for using the term "non-refundable" in their retainer agreements. We do not believe that lawyers who mistakenly employ the wrong term for an otherwise-proper fee agreement should be disciplined. In addition, ABA Model Rule 1.5</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which</p>

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					<p>does not impose discipline for use of the term “non-refundable.”</p> <p>Adoption of the Proposed Rule 1.5(e) would mean that a lawyer following public policy and using a written fee agreement, but selecting the term “non-refundable,” would be subject to discipline, whereas a lawyer working without a written fee agreement would not be disciplined. That result would provide a disincentive for using written fee agreements and would be contrary to the expressed policy of the State of California.</p> <p>The distinction between “non-refundable” and “true retainer” is subtle. Ethics experts can and often do disagree. Many criminal defense lawyers (and a host of other lawyers) do not know the nuanced issues that can be triggered by use of these terms, and in reality, many lawyers use the terms interchangeably. Lawyers are not and should not be subject to professional discipline for inadvertence or negligence.</p> <p>Use of a non-refundable fee is not sanctionable in other jurisdictions. As a Louisville Bar Association article notes, “[m]any jurisdictions, including Kentucky, allow an attorney to refer to a fee as non-refundable.” A recent order from the Michigan Supreme Court validated a lawyer’s non-refundable fee agreement in a disciplinary case, and dismissed the charges against the lawyer. (attached) The Court cited the relevant</p>	<p>constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer’s property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer’s property immediately on receipt; (iv) that the fee agreement does not alter the client’s right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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					<p>rule, and stated that the “agreement is unambiguous because it clearly states that the \$4,000 minimum fee is non-refundable.” In addition, esteemed ethics professors Geoffrey Hazard and William Hodes conclude that “[s]everal situations may be imagined in which a substantial non-refundable fee—better understand as a minimum fee—might be justified.”</p> <p>While we do not support or endorse gratuitous use of the term “non-refundable,” we do oppose a rule that will discourage written fee agreements and subject to discipline numerous lawyers who misunderstand the sophisticated distinctions, particularly when this terminology is widely permitted throughout the United States.</p>	
54	Bloom, Allen	D	No	1.5(e)(2)	<p>The prohibition of a non-refundable fee option would have serious negative consequences on the rights and benefits of a client/defendant in a criminal case.</p> <p>I can unequivocally state that the benefits and rights of an defendant/client in a criminal case would be considerably benefitted by having the option of being able to accept an attorney fee agreement on a non-refundable fee basis. The foundation for my beliefs are as follows:</p> <p>1. A non-refundable and fixed fee agreement provides certainty to the client. They know what they are going to pay at the beginning of the case and they never have to worry that their fee will increase. In my cases,</p>	

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					<p>it usually means that I have greatly undercharged the client, because I end up spending more time on the case than I originally estimated, yet never charge a client more.</p> <p>2. It provides better and full service to the client. The client never has to practice "check-book defense", deciding whether a particular meritorious motion or legal task should be taken as compared to what it would cost. There never is a "short changing" of services, but rather is an expansion of services available.</p> <p>3. It increases access to the attorney. A client doesn't ever have to worry that he is going to suffer financially by being billed by communicating with his attorney a multitude of times. In this regard, I am reminded of a true story involving the client who met his lawyer at the Padre game, talked about Tony Gwynn and the Padre pitching and asked about the status of his case, only to receive a bill the following week for legal consultation.</p> <p>4. It eliminates the chances of conflict between the client and his attorney. Because the attorney also gains certainty in the receipt of a non-refundable fee at the beginning of the case, there never is a situation where the attorney is not paid for his services, either intentionally or because of a change of financial circumstances of the client, meaning that the attorney does work for the client - maybe is forced to go to trial</p>	

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					<p>for the client cuz the judge will NOT relieve an attorney just for the client's failure to pay - all of which builds in a sometimes subtle and sometimes not so subtle conflict between client and attorney.</p> <p>It It should also be noted, that a non-refundable fee agreement is really a much fairer system, if there is ever a dispute as to the fee. This works to the benefit of the client. Let's look at the two circumstances: non-refundable and refundable.</p> <p>If there is a NON-refundable fee agreement, and at the end of the case or anywhere in the middle, the client disputes the fee, the client has the right to (a) attempt an informal resolution, but if such a resolution is not successful, has the right to (b) DEMAND arbitration and the atty MUST, as a matter of state law, accept the arbitration requirement. Of course, the client has the option of (c) filing a law suit. In all matters the attorney is obligated to try to resolve the matter.</p> <p>On the other hand if there is a REFUNDABLE fee agreement, and the client disputes the fee, the client has the right to (a) seek an in informal resolution, but if such a resolution is not successful, but here the situation changes. The disputed funds now have to be placed in a special trust account and though the client has the right to demand arbitration, the attorney does NOT have the right to do so. In short, the client can refuse to try to settle the issue, and ignore all the</p>	

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					<p>efforts of the attorney to resolve the situation. The money remains in the trust account and the client, if she wishes, can do absolutely nothing and if she acts in this way, the ONLY resolution that the atty has is to SUE HIS CLIENT. It destroys atty-client trust; it works greatly to the detriment of the client; it potentially opens the door to privileged communications - it's just bad.</p> <p>Finally, it should be remembered that, of course, it is possible that there could be abuses by the unscrupulous atty taking advantage of a non-refundable fee agreement. There is a remedy in place to deal with such a circumstance. If a case is dismissed two days after filing, then, of course, the prohibition against unconscionable fees and my own ethics, demand that I return a large, if not all, the fee. If I, not my client, were to walk away from representation, then the full fee should be returned.</p> <p>But problems with unscrupulous attorneys can occur with equal frequency with any other billing system: hourly (where the hours can be gouged and multiplied for unnecessary work); task (where poor work can be done for services). simply put, there is no billing system which is immune for an unscrupulous attorney, or for that matter, an unscrupulous client. The best way to have fair fees and good services for clients, is to have good attorneys and fair clients, and no system of billing guarantees that, however, we should look to</p>	

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					create a system which enhances the chances of good representation, and I have found, after 35 years of practice, that the best method is through a non-refundable fee system.	
7	Borden, Mark	D	No	1.5(e)	<p>If adopted, Paragraph (e) will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, seriously undermine the attorney-client relationship, and prevent many clients from obtaining representation. It is contrary to the interests of the two groups who are most affected, the lawyer and their clients.</p> <p>Commenter's letter contains 14 examples of potential negative impacts concerning the Proposed Rule.</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon</p>

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						legal services have not been completed.
59	Breeze, John W.	D	No	1.5(e)(2)	<p>As an attorney that has been in private practice for the last 33years, I highly disagree and oppose the proposed change to Rule 1.5(f), providing that "a lawyer shall not make an agreement for, charge, or collect a nonrefundable fee, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purposes of insuring the availability of the lawyer for the matter."</p> <p>This language clearly demonstrates the Commission's clear intent to abolish nonrefundable retainers subject to the limited exceptions in subparagraph (e). It prohibits the long-established practice of charging a minimum fee to insure availability where the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer.</p> <p>The obvious problem with subparagraph (e)(2) is that if any portion of a "nonrefundable" fee "may be" refundable, then the entire fee cannot be the lawyer's property. As a lawyer who has been in private practice since 1976, I highly oppose this amendment to the rules that would basically outlaw nonrefundable retainers. Isn't there anyone that has actually practiced in the private sector who understands what a nonrefundable retainer is? These types of fees are necessary in order to secure the attendance of attorneys at upcoming court proceedings and to</p>	

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					<p>guarantee that the client will be represented at those proceedings. If I am going to be required to refund, non refundable retainer fees, then I might as well get out of private practice.</p> <p>The amendment also fails to take into consideration that lawyers pay income taxes on nonrefundable retainer fees and if these fees are going to be refundable, it will have an impact on the lawyer's ability to report his true income to the Franchise Tax Board and the IRS.</p> <p>I ask you whether the State Bar has received any complaints from any of my clients dealing with the issue of nonrefundable retainer fees. I have no knowledge that any of my clients have ever objected to being charged a nonrefundable retainer fee. Therefore, there is no need to amend the Rules of Court if there are no complaints regarding the way I deal with nonrefundable retainers.</p> <p>This is just another example of how the State Bar is trying to legislate in an area that properly needs to be addressed either by the state legislature or by lawyer professional groups as opposed to the State Bar. I strongly recommend that this amendment be rejected.</p>	
18	California Attorneys for Criminal Justice (CACJ)	D	Yes	1.5(e)	Non-refundable retainer agreements have been accepted as proper fee arrangements for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is	

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					<p>“earned when paid”) was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of “fixed fees,” “flat fees,” and “non-refundable retainers” as long as the written agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are “earned when paid.”</p> <p>We are unclear why the Board is now considering a ban on non-refundable fee agreements. As we understand it, there have not been a substantial number of complaints from consumer/clients about such fee arrangements. Without a factual basis to justify the ban or the modifications as proposed, the action seems to be lacking in utility.</p> <p>As with all fee agreements, non-refundable fee arrangements are subject to well-established professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include: (1) the rule against charging excessive fees (Rule 1.5(a)) and (2) the longstanding rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). These existing rules seem to curb abuses by unscrupulous lawyers. Further action seems to be lacking justification.</p> <p>As proposed, Paragraph (e)(1) and Comment [8] prohibit the established practice of charging a</p>	

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					<p>minimum fee to ensure availability (true retainer) when the client will also be credited for future work done, whether on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client by insuring the attorney's availability and prevents the lawyer from receiving a true retainer earned when received if he/she performs any legal work whatsoever. These types of fee arrangements are very common. They give a sense of certainty or security to the client and protect the attorney from being uncompensated.</p> <p>Paragraph (e)(2) and Comment [5] would often require that the "non-refundable" "flat fee" cover fees for the entire length of the case, including trial. This is not required under current rules and it not practical. Since the proposal would require the "flat fee" to cover contingencies (e.g., trial or an administrative evidentiary hearing) that often cannot be accurately predicted (or, truly foreseeable) at the inception of the agreement, the flat fee that covers these contingencies may need to be significantly higher than it otherwise would be at the outset. In other words, lawyers may feel the need to charge a larger fee to cover unforeseen contingencies, even those that are not truly likely to occur. This will make certain services unaffordable and in the absence of a true justification, is not in the best interest of either the consumer/client community or the Bar.</p>	

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					<p>Paragraph 1.5(e)(2)'s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially will develop. It is also inconsistent with the "sanctified" State Bar fee forms that have been distributed by the Bar for approximately the past 20 years and represent the "gold standard" for California lawyers.</p> <p>Flat fees, earned when paid, often work to the benefit of the client especially in criminal matters when clients typically have less money available to hire a lawyer. Often lawyers quote flat fees that are far less than what the cost would be if charged at an hourly rate. If the lawyer agrees to non-refundable "flat fee" that is earned when received and substantially underestimates the legal work ultimately performed, s/he will certainly not be terminated by the client. However, when the lawyer through reputation, skill and ability has, in a short time, obtained a significant result that may curtail the case or cuts short the life of the case, the Proposed Rule encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee," which, under the Proposed Rule would no longer be "the lawyer's property" to which the lawyer is entitled. This is not a just result.</p>	

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40	Campbell, James F.	D	No	1.5(e)(2)	Non-refundable fees, or flat fees, have been used in criminal cases in California for well over a hundred years. The average client is better served by a flat fee in a criminal case, particularly in a misdemeanor case, where to charge hourly would be prohibitive. The average client in a criminal case has no way of having the costs for criminal representation predicted with any real accuracy. It is very difficult for defense lawyers to collect an hourly fee in a criminal case after the work has been performed. The flat fee structure is a better way to deliver this type of legal representation. The client has a predetermined fee that they know they can pay or not pay. It is not open ended. This also encourages counsel to more efficiently deliver the legal service without an eye on the clock. To my knowledge, I have not heard of any reports where clients have been harmed by non-refundable retainers in criminal cases. I know that my clients are very happy to know what it will cost to defend the case and that the fee will not exceed that non-refundable flat fee. I wish I had more room to tell you how stupid an idea this is. Where is the problem that you feel needs a solution?	
42	Cooper, James	D	No	1.5(e)(2)	With respect to privately criminal cases, the hourly rate scheme is impractical and unworkable. If attorneys could only ask for their compensation after the services have been provided, then clients would never pay us. There are rules in place to deal with excessive fees. This proposed rule would actually frustrate a client's effort to hire a lawyer.	

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10	Criminal Defense Lawyers Club of San Diego	D	Yes	1.5(e)	<p>This Proposed Rule puts in place a condition that essentially makes the fee “flat” only upon the client’s wish as the case proceeds. If the work for the attorney is substantial, the client will be content with the flat fee arrangement. But if the attorney seems to be on the way to a result that will end the case on a favorable note for the client can pull out of the “flat fee” contract, fire the attorney, and demand a substantial refund.</p> <p>Specifically, paragraph (e) of Rule 1.5 prohibits non-refundable retainers for legal services except under the circumstances outlined in subpart (1) and (2). Yet, the latter Rule, while first stating the fee is the attorney’s on delivery, then says the client may be entitled to a refund prior to the “completion” of services. This paragraph adds uncertainty (which will certainly promote fee disputes) and promotes the problem identified in the preceding paragraph.</p>	<p>To address the commenter’s concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer’s property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer’s property immediately on receipt; (iv) that the fee agreement does not alter the client’s right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>
1	Daar, Randolph E.	D	No	1.5(e)	I have used non-refundable retainers at various times in my practice. The rules that exist now adequately	To address the commenter’s concerns but still provide for enhanced client protection,

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					<p>protect clients from excessive fees or failure of lawyers to refund fees upon withdrawal from representation. The new proposed rule deprives a client of the ability to formally retain an attorney in the circumstance in which, because of the nature of the scope of the proposed representation, it is necessary to secure the attorney services.</p>	<p>the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>
23	Davies, Leroy	D	No	1.5(e)(2)	<p>It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers who over-charge, and which provides a</p>	

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					<p>uniform yardstick regardless of the type of billing arrangement (hourly, contingent or flat).</p> <p>It is internally inconsistent and confusing: the fee is the “lawyer’s property on receipt,” but the client is told s/he/it “may be entitled to a refund” under circumstances.</p> <p>It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that “the client may be entitled to a refund of a portion of the fee” appears to give clients a residual interest in a fee that purportedly was “the lawyer’s property immediately on receipt.” This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fee arrangements, and injunctions, assessments and/or forfeitures, are commonplace.</p> <p>It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some lawyers), to avoid disputes with clients seeking a refund because “the agreed-upon legal services have not been completed.”</p> <p>It may incentivize lawyers to minimize in retainer agreements the extent of the work for which a flat fee is being paid, in order to avoid disputes with clients seeking a refund because “the agreed-upon legal</p>	

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					<p>services have not been completed." Greater clarity and detail in retainer agreements, not less, should be encouraged, not discouraged.</p> <p>It has no counterpart in the ABA Model Rules. Thus, it does not advance the goal of national uniformity, which was among the goals of revising California's existing rules of professional conduct. There also is no judicial or other authority, or national experience, to inform us of the consequences of adopting the novel rule.</p> <p>Finally, it was submitted to the State Bar Board of Governors for preliminary approval without the <i>prior</i> public comment that is mandated by State Bare Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.</p>	
48	Dillworth, Andrew & Balin, William	D	No	1.5(e)(2)	<p>We oppose subdivision (e) of rule 1.5 as presently drafted.</p> <p>Subdivision (e) begins with the predicate that "[a] lawyer shall not snake an agreement for, charge, or collect a non-refundable fee, except:...." We respectfully submit that there is no such thing as a "non-refundable" fee and therefore the premise upon which the subdivision is based is misguided and is likely to create unnecessary confusion for both lawyers and clients.</p> <p>The predicate language carries two implications. First, it implies that a fee can actually be non-refundable.</p>	

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					<p>Second, it implies that a non-refundable fee is ethically permissible in certain circumstances. According to proposed rule 1.5(e)(1) & (2), those circumstances include: (1) a true retainer, and (2) a flat fee for specified services.</p> <p>Even a true retainer, however, is subject to possible refund under the particular facts and circumstances of a case. If a lawyer whose availability is to be secured by a true retainer is not available, then there is no legitimate basis for the lawyer to keep the retainer. Consider, for example, a situation in which the retainer is paid to secure the availability of a prominent criminal defense attorney. The client's willingness to pay the retainer is based on the attorney's high profile in this area of practice, and her busy trial schedule. Were the attorney to subsequently advise the client that she had another case that demanded her attention but someone else within the firm would be available to represent the client, would the client not be entitled to a refund of the true retainer?</p> <p>A true retainer must also be earned in order for the lawyer to have a legitimate claim to it. If the lawyer makes him or herself available for the agreed period of time then she earns the retainer. It may be earned earlier than subsequent fees incurred in connection with the provision of actual legal services, but it is not earned simply by the lawyer's physical receipt of the funds. The same is equally true, if not more so, with</p>	

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					<p>regard to a flat fee for specified services. Such fees typically contemplate not only availability of the lawyer or law firm, but the provision of specified legal services in connection with the case. In many cases this includes the totality of legal services that will be required from beginning to conclusion of the representation. A flat fee is not earned on receipt of the funds, but rather upon provision of the specified legal services.</p> <p>From the misguided premise that a fee can be non-refundable, subdivision (e) compounds the problem by stating "[i]f agreed to in advance, in a writing signed by the client, a flat fee is the lawyer's property on receipt." In our view, it should not be within the purview of the fee rule to try and create, modify or dictate property rights between lawyers, clients and third parties; and, the inclusion of this language does not effectively establish such rights. Moreover, attempting to define such rights and interests under a general rule ultimately fails because the issues of "when" a fee is earned and "whether it is to be refunded" are fact-specific.</p> <p>Subdivision (e) seems to acknowledge these points when it states that a lawyer who is attempting to earn his or her fat fee "upon receipt" must nonetheless advise the client in writing that the non-refundable fee may in fact be refundable if the agreed-upon legal services have not been completed. Subdivision (e)</p>	

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					<p>therefore sets up an oxymoron. It purports to recognize the existence and permissibility of a "non-refundable" fee earned on receipt, while simultaneously acknowledging that such a fee is still "refundable."</p> <p>The general public and lawyers, who seek guidance from the rules of professional conduct, are not well-served by a facially inconsistent rule - particularly in an area as important as the provision and handling of client funds. It is common knowledge that the lawyers), are entitled to clear guidance regarding these issues. The confusion created by subdivision (e) is exacerbated by the fact that the requirements of 1.5(e)(2)(iii)-(v)' which deal with flat fees are not present in 1.5(e)(1) which deals with true retainers. Proposed rule 1.5(e)(2)(iii)-(v) requires a lawyer to advise a client in writing:</p> <p>"... (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the lawyer-client relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed."</p> <p>Why is a client who pays a flat fee, but whose lawyer does not perform any or all of the contemplated services, entitled on the face of the rule to a potential refund while a client who pays a true retainer, whose lawyer is not in fact available, is not? Why, for that matter, is the flat fee earned on receipt when the true retainer is not? The materials provided by the</p>	

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					<p>Commission do not provide a rationale for differentiating between these two types of allegedly non-refundable fees, yet the requirements set forth in 1.5(e)(2) are not set forth in [.5(e)(l). We respectfully suggest that the answer to these questions is that neither fee is truly "non-refundable," and neither is "earned" simply by receipt.</p> <p>The notion that a true retainer or flat fee can truly be non-refundable is also at odds with the language in proposed rule 15, as well as other rules of professional conduct, which recognize that a fee (regardless of type) may not be illegal or unconscionable, and that any unearned portion of a fee must be refunded. See, e.g., proposed rules 1.5(a) and 1.16(e). The provisions of subdivision (e) as drafted make these other provisions and rules, and the relationship between them, all the more confusing for practitioners and clients.</p> <p>The effort to dictate through a rule of discipline when a fee is earned and whether it is refundable is also inconsistent with the approach taken by the Commission in other rules. For example, proposed rule 1.15(g) recognizes that when there is a dispute between a client and lawyer over funds, the lawyer must place the disputed funds in a trust account until the dispute is resolved. The rule does not seek to determine whether the fees were in fact earned, who they belong to, etc, What principled basis is there for</p>	

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					<p>taking a different approach when addressing the important and fact-specific issue of whether a client's fee will be non-refundable?</p> <p>Given that the provisions of subdivision (e) undermine its central premise (i.e., that a fee can be non-refundable), the question becomes "what is the real purpose and function of subdivision(e)?" The answer apparently is that it is directed at assisting a subset of lawyers (principally, criminal defense lawyers) in trying to fend-off third party efforts to seize client funds. We would respectfully submit that regardless of whether one agrees with the proposition that a fee rule should be drafted for the purpose of delineating property rights between a client and a third party, the effectiveness of the provision is dubious. It is not clear that a rule of discipline would have any effect on resolution of the legal issue of who actually owns or is entitled to the property (whether through seizure proceedings or otherwise).</p> <p>Whatever minimal benefit lawyers might receive from being able to point to such language is significantly outweighed by the confusion and risks that such a rule would create for clients. The esoteric issues, and special interests, that underlie the rationale for subdivision (e) will be lost on clients. At the end of the day, a client who reads subdivision (e) is left with the following: (1) a true retainer to secure availability is non-refundable, and the default is that it is earned</p>	

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					<p>upon receipt, even if the lawyer ends up being unavailable, and (2) a flat fee for specified services can be non-refundable but even if the parties agree it is non-refundable it may still be "refundable." Will a client who reads the proposed rule have an accurate sense of the non-refundable nature of the fee?</p> <p>As the Commission is undoubtedly aware, there have historically been significant differences of viewpoint with regard to true retainers, flat fees and non-refundable fees. This longstanding disagreement, even among lawyers who devote their practices to matters of professional responsibility, demonstrates why subdivision (e), as drafted, is not helpful to lawyers or to clients. Simply put, the subdivision does not provide greater clarity, it only muddies already murky waters.</p> <p>The language of subdivision (e) comes in large part from Washington State Rule of Professional Conduct 1.5. The use of Washington's language, while undoubtedly well-intentioned, is eventually unproductive because the Washington rule and the proposed rule address different issues. The Washington rule is tied in large part to the placement of funds received from the client, It creates an exception to the general requirement that the funds be placed in a trust account by providing that flat fees do not need to be placed in a trust account. Unlike most other states in the country, California is generally considered not to require an advance fee to be placed</p>	

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					<p>in a trust account. See, e.g., <i>Baranowski v. State Bar</i> (1979) 24 Cal.3d 153, 164; see also Cal. State Bar Formal Opn. 2007-172 ("Under rule 4-100, as it has been construed by the courts, an attorney is ethically permitted, but not required, to deposit fees not yet earned into a client trust account."). The purpose behind the Washington rule therefore doesn't exist in California where the exception has already been embodied by California law.</p> <p>Which brings us back to the question what is the real purpose and function of subdivision (e)? Subdivision (e) does not benefit clients. A client has no interest in a fee truly being non-refundable, only the lawyer stands to gain. So, at the end of the day, subdivision (e) will exist for the purpose of assisting a subset of lawyers in fending-off third party claims to client funds through provisions that are unlikely to have any substantive impact on the legal issue of who is actually entitled to the funds.</p> <p>We respectfully urge the Commission to amend proposed rule 1.5(e) to prohibit non-refundable fees in their entirety, as no fee is truly non-refundable. We understand that such a rule was originally proposed by the Commission. We further urge the Commission not to try and use the fee rule to address when a fee is earned, or who owns it. A straightforward rule prohibiting, non-refundable fees would provide clear guidance to both clients and to lawyers. It would also</p>	

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					<p>be consistent with established case law and other rules of professional conduct that recognize that a fee must be earned, and that a fee is always subject to "potential refund" depending on the facts and circumstances.</p> <p>If the Commission does not wish to prohibit non-refundable fees through a rule of discipline, then we urge the Commission to get rid of subdivision (e) altogether. Its inclusion is unnecessary. Clients will not be prejudiced by its omission. Nor will its omission place lawyers (criminal defense or otherwise) in a position any different than that which currently exists, and thus will not prejudice their ability to make the substantive arguments on which they seek to rely in responding to third party claims.</p>	
22	Dorvall, Shannon M.	D	No	1.5(e)(2)	<p>Not necessary. Sufficient safeguards in the long-standing existing rule re charging unconscionable fees to protect clients from being overcharged under all billing arrangements.</p> <p>Internally inconsistent and confusing to state the fee is the lawyer's property on receipt but the client is told it may be refundable under certain circumstances.</p> <p>Will lead to litigation in the context of an injunction, jeopardy assessment or forfeiture because language providing "the client may be entitled to a refund of a portion of the fee" appears to give clients a residual</p>	

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					<p>interest in a fee that purportedly was “the lawyer’s property immediately on receipt.” Will also lead to proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fee arrangements, and injunctions, assessments and/or forfeitures, are commonplace.</p> <p>May be incentive for lawyers to delay, rather than resolve, disputes where clients seek refunds because “the agreed-upon legal services have not been completed.</p> <p>May be incentive for lawyers to minimize clear description in fee agreement of agreed-upon services to be provided. Greater clarity and detail should be encouraged.</p> <p>No ABA counterpart thus does not advance goal of national uniformity. No judicial or other authority, or national experience, to inform of consequences of adopting a novel rule.</p> <p>Submitted to BOGs for preliminary approval without prior public comment as mandated by State Bar rules, thus suffers from lack of input from affected practitioners.</p> <p>May result in lawyers declining to accept representation on flat-fee basis providing disservice to clients who require certainty of flat-fee arrangement vs.</p>	

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					potentially limitless cost of retaining counsel on hourly basis.	
26	Duree, John	D	No	1.5(e)(2)	<p>I have been in private practice for 29 years. I have used flat fee, non-refundable retainers in at least 85% of my cases. I have never had a fee dispute with a client in a flat fee case, because my contracts are simple, straightforward and fair. My clients appreciate agreements of such a nature because they know the total amount my representation will cost. They are beneficial to me because I do not have to concern myself with time keeping or collections and our decisions on how to proceed in the case are not cost-based; unlike civil cases, my cases are usually about liberty, not money, and assessing strategies on the basis of their cost is simply not done in my practice.</p> <p>My initial agreements are for flat fee amounts through the preliminary examination. If the case goes beyond that point, I reach a new agreement or withdraw. My clients are clearly informed of this limitation at the outset, and I have never had a dispute on this issue. The reasons for this limitation are: First, most cases resolve at, before or immediately after the prelim--to charge a fee based on going, through trial when less than 5% of my cases go that far would be unnecessarily expensive to the client. Second, case law does not require a motion to withdraw if the attorney wishes to do so between the prelim and the next appearance. It is a natural breaking point in the litigation. Third, I do not know how extensive a jury trial</p>	

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					<p>will be until I have done the review and investigation of the matter, which, in my practice is largely done prior to the prelim. Postponing the fee agreement for trial allows me to make a fair estimate of the extent of work trial would require and hence, to set a fair fee. The timing also gives my clients the opportunity to decide whether to continue with me or to seek other counsel after they know the total fee.</p> <p>I have charged hourly fees in a number of cases, generally when my client is a corporation or quite wealthy. The reason I am willing to bill hourly in such cases is that the client is sufficiently financially strong that I am confident that my bills will be paid. I have found that my total fees are substantially higher when I bill hourly. Hourly billing would not be an effective method of paying for representation for me or for most of my clients,</p> <p>I am not sure why the state bar is considering a change to rules governing fee agreements to get rid of a fair and workable method for attorneys and clients operating in the criminal justice system, but I hope, on full reflection, it will decide against such change.</p>	
44	Gabbert, Paul L.	D	No	1.5(e)(2)	I have first hand experience in the importance of non-refundable retainers and their significance to the attorney-client relationship in general and in fee forfeitures and Internal Revenue Service ("IRS") and California Franchise Tax Board ("FTB") jeopardy and termination assessment, seizure and levying contexts	

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					<p>in particular. On at least three occasions, in which I was representing clients who had their assets seized for federal or state forfeiture, and my compensation was contingent upon obtaining the return of the seized currency, all of the money was seized pursuant to IRS and FTB assessments. This, in turn, required substantial collateral litigation to obtain the return of the funds and payment of my fees.'</p> <p>True retainers and other fixed fees are the only way for practitioners to avoid these pitfalls.</p> <p>Initially, it is my understanding that the proposed new rule was adopted by the Board of Governors without appropriate notice and public comment as required by Rule of the State Bar 1.10(A). The present provision for post-hoc public comment neither solves nor resolves the Special Commission's and the Board of Governors' apparent failures to follow their own rules.</p> <p>Although the purported purpose of the new rule is to protect clients, it appears to work to the detriment of clients and attorneys as well as ignoring the reality of more than a century of practice by California attorneys who have used various varieties of the non-refundable retainer fee. It is also my understanding that the Board of Governors has previously endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" earned upon receipt. Nor am I aware of any course of conduct or pattern of wrongdoing by</p>	

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					<p>California attorneys that would warrant modifying the existing rules as well as implicitly questioning the case law upholding them that are not already adequately provided for in the existing body of rules prohibiting the obvious: charging unconscionable fees and stealing money from clients for services not performed.</p> <p>The primary reason that the non-refundable retainer or other fixed, fee earned upon receipt is essential to criminal defense practitioners and to their clients is to avoid fee forfeiture, seizure by tax assessments, orders to withhold, levies, restraining orders, preliminary injunctions, and years of uncompensated collateral litigation that distracts the lawyer from the purpose for which he was hired. The proposed new rule with its multiple qualifiers and conditions muddies rather than clarifies the existing law. State and federal prosecutors, agents and taxing authorities will have a field day with the proposed rule. It opens the door to seemingly endless "investigations" regarding the nature of the legal work performed by the lawyer and whether or not the fees belong to him or to the client. By definition, any monies deposited into the client's trust account belong to the client and are fair game for seizure, levy, and forfeiture.</p> <p>In criminal securities litigation involving federal prosecutors and the Securities and Exchange Commission ("SEC") payment of attorney's fees and the relationship of that payment to restraining orders</p>	

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					<p>and preliminary injunctions can not only distract the attorney from the case she was hired to defend, it can eclipse the underlying case and result in the attorney having to defend herself in contempt proceedings based on how her fee was paid. Even when the attorney prevails in the litigation, this can result in the functional equivalent of a fee forfeiture because the cost of successfully defending the civil contempt action can greatly reduce or eradicate the fee paid to defend the client in the underlying criminal action.</p> <p>Thus, the proposed new Rule 1.5(e)(2) exposes members of the bar performing a variety of legal services to substantial financial risk and additional, uncompensated, extrinsic litigation by increasing the likelihood of the restraint and/or seizure of fees where the client has criminal, bankruptcy, state or federal tax or SEC investigations as well as being subject to a civil or criminal forfeiture or restraining orders.</p> <p>Given the existing minefields in these multiple, overlapping areas of practice, Rule 1.5(e)(2) not only substantially increases the risk of attorney fee seizure and forfeiture, it will deprive many criminal defendants of their Sixth Amendment rights to the retained lawyer of their choice and prohibit many civil clients facing state and federal regulatory and civil penalty actions from retaining counsel.</p> <p>Rule 1.5(e)(2) provides that "[i]f agreed to in advance</p>	

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					<p>in writing signed by the client, a flat fee is the lawyer's property upon receipt." Whether or not this is a true statement depends upon the applicable substantive law and a host of factually particular circumstances. Pursuant to its rule making authority, the State Bar cannot promulgate, overrule, alter, amend, or change existing substantive law. The cited portion of the proposed new rule in conjunction with its subsequent, multiple conditions and qualifications, is an unnecessary attempt to meld diverse areas of the law into a single rule that encompasses all potential future circumstances. Given the protean nature of human conduct, this is a factual impossibility, and greatly exceeds the Bar's rule making authority.</p> <p>Cash flow is the economic life blood of all law firms. Under the proposed new Rule, and its multiple exceptions, when a skilled lawyer through knowledge, experience, reputation and carefully cultivated relationships obtains a significant benefit for the client within a short time, that does not resolve the entire case, the new Rule encourages clients to terminate representation without cause and obtain a refund of a substantial portion of the "flat fee" that would, under this proposal, no longer apparently belong to the attorney.</p> <p>Although it may seem counter intuitive, or even counter-empirical, to those who have not practiced in this area, there can be a surprising lack of gratitude</p>	

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					<p>and loyalty from clients even when counsel obtains significant results during the course of the litigation such as pre-trial release on bail, partial suppression of evidence, a severance of the defendant, the release of some assets, and the severance or dismissal of counts.</p> <p>In short, there is no apparent historical, factual, legal or logical basis for the proposed new rule. It appears to unnecessarily and unreasonably create fertile new ground for fee disputes, including arbitration claims, bar complaints and lawsuits, as well as fee seizures, fee levies, fee forfeitures, and civil and criminal contempt proceedings against attorneys. Accordingly, the proposed new rule should be withdrawn.</p>	
31	Garcia, Antonio	D	No		No comment submitted.	
28	Gericke, J. Robert	D	No	1.5(e)(2)	<p>I am opposed to the suggested new rule. In California we have a strong policy of protecting clients, as well we should. However, I think that in the field of criminal law there needs to some consideration to protecting the attorney. The nonrefundable fee tends to do that while also offering the client clear notice of the cost of representation.</p> <p>I would also note that fees in criminal cases tend to be pretty affordable compared to other areas of practice. If the reader has ever been through a divorce this should be evident.</p>	

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					<p>The rules for being relieved due to non-payment are different in criminal cases and this is another consideration. If non-refundable fees are banned should criminal attorneys charge by the hour? Can they be relieved more easily for nonpayment? What impact will this have on court calendars?</p> <p>I strongly urge that this proposed rule be scrapped. Criminal clients have many other protections. This rule is not needed.</p>	
49	Goodman, Louis J.	D	No	1.5(e)(2)	Joins in the comments of CACJ, above.	
8	Gordon, Kenneth G.	D	No	1.5(e)	<p>My principal concern with the proposed change to Rule 1.5(e) has to do with the language of (e)(2) pertaining to flat fees. Assuming the attorney and client agree in writing, a flat fee is the lawyer's property on receipt. As such, the attorney should properly deposit this fee into his operating account and take it into income. In a tax sense, the attorney has dominion and control over the fee and should treat it as income. In the event that it is not the lawyer's property or is subject to a substantial risk of forfeiture, then the tax treatment would be otherwise. The language of Proposed Rule 1.5(e)(2)(v) provides that the written fee agreement shall include a provision that the client may be entitled to a refund of a portion of the fee if the agreed upon legal services have not been performed. This language appears to introduce a substantial condition into the equation of the lawyer's dominion and control of the fee.</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the</p>

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					<p>I believe that there are sufficient remedies against abuses, such as the non-performance or incompetent performance of legal services, without the broad brush approach embodied in the Proposed Rule that not only alters property rights, but puts the interests of both the lawyer and client at risk in certain fact situations.</p> <p>The core issue under the Proposed Rule is one of property or interest in property. It appears that the Proposed Rule is confusing and inherently contradictory. If the flat fee is the lawyer's property upon receipt, then there should not be a basis for seizure. However, if the client has a right to a refund of fees attributable to services not completed, then the client has a property interest that can be seized by a taxing agency.</p> <p>My comments have addressed the proposed rule change within a very narrow range of my tax practice and focused on a particular civil tax issue. There are many other factual situations, including those within the criminal law context, that raise issues of legal exposure for both the attorney and client which have not been addressed in this letter. Hopefully, the Commission considering this rule change will reconsider its position regarding this Proposed Rule. Existing legal remedies and professional restraints on attorneys are, in my opinion, sufficient to protect clients. The obfuscation of property rights pertaining to</p>	<p>total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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					flat fees appears counter-productive to the interests of clients.	
34	Gregory, Kenneth C.	D	No	1.5(e)(2)	<p>Your proposed rule is misplaced on so many levels. First, I share a concern that a significant level of deceit is involved in moving this proposed rule forward. The normal and typical process for introducing such a rule has been ignored; in favor of a secretive and deceitful move to push consideration of the rule without encountering known and legitimate opposition – THAT IS NO WAY FOR THE GOVERNMENT TO CONDUCT PROPER BUSINESS.</p> <p>Second, the premise for the bill is seriously flawed and appears to be someone’s personal vendetta rather than a legitimate need looking for an actual solution. I recommend that you take the time to read and consider the attached letter from CACJ.</p>	
53	HALT (Theresa Meehan Rudy)	D	No	1.5	<p>HALT is disappointed by the Commission's rejection of the ABA Model Rule, and its abject failure to propose any meaningful ethical standards to govern attorneys fees. By retaining the operative language in current California Rule of Professional Responsibility 4-200, Proposed Rule 1.5 would only prohibit fees that are "unconscionable or illegal." An ethical rule that prohibits only the unenforceable and the unlawful adds nothing. For many years, HALT has raised questions about the elasticity of the ABA's requirement that attorneys only charge "reasonable" fees. But even that flawed approach offers some protection to consumers. The California approach protects only lawyers who</p>	

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					charge unreasonable fees. HALT urges the Commission to revisit the issue of reasonable attorneys fees and, at a minimum, adopt the ABA Model Rule.	
21	Hansen, Michael E.	D	No	1.5(e)(2)	<p>It is unnecessary in light of California’s long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingent or flat).</p> <p>It is internally inconsistent and confusing: the fee is the “lawyer’s property on receipt,” but the client is told s/he/it “may be entitled to a refund” under circumstances.</p> <p>It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that “the client may be entitled to a refund of a portion of the fee” appears to give clients a residual interest in a fee that purportedly was “the lawyer’s property immediately on receipt.” This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fee arrangements, and injunctions, assessments and/or forfeitures, are commonplace.</p> <p>It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some</p>	

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					<p>lawyers), to avoid disputes with clients seeking a refund because “the agreed-upon legal services have not been completed.”</p> <p>It may incentivize lawyers to minimize in retainer agreements the extent of the work for which a flat fee is being paid, in order to avoid disputes with clients seeking a refund because “the agreed-upon legal services have not been completed.” Greater clarity and detail in retainer agreements, not less, should be encouraged, not discouraged.</p> <p>It has no counterpart in the ABA Model Rules. Thus, it does not advance the goal of national uniformity, which was among the goals of revising California’s existing rules of professional conduct. There also is no judicial or other authority, or national experience, to inform us of the consequences of adopting the novel rule.</p> <p>Finally, it was submitted to the State Bar Board of Governors for preliminary approval without the <i>prior</i> public comment that is mandated by State Bare Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.</p>	
45	Heithecker, Philip	D	No	1.5(e)(2)	Flat fee retainers in our rurual county allows access to defense attorneys. Simply put, most, if not all, of my clients could not afford my hourly rate. Defendants would be left without representation as they would be too wealthy for the public defender and not wealthy enough for a private attorney.	

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37	Hicks, Aaron	D	No		If we are forced to do away with flat fee retainers, our clients will be billed much higher fees based on hourly work on their case. Most will not be able to afford private representation. Many will be forced to go with public defenders, crippling the private bar and bankrupting the state for the public defender representation. Please leave this alone.	
19	Imhoff, Vince	D	No	1.5(e)(2)	<p>Not necessary. Sufficient safeguards in the long-standing existing rule re charging unconscionable fees to protect clients from being overcharged under all billing arrangements.</p> <p>Internally inconsistent and confusing to state the fee is the lawyer's property on receipt but the client is told it may be refundable under certain circumstances.</p> <p>Will lead to litigation in the context of an injunction, jeopardy assessment or forfeiture because language providing "the client may be entitled to a refund of a portion of the fee" appears to give clients a residual interest in a fee that purportedly was "the lawyer's property immediately on receipt." Will also lead to proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fee arrangements, and injunctions, assessments and/or forfeitures, are commonplace.</p> <p>May be incentive for lawyers to delay, rather than resolve, disputes where clients seek refunds because "the agreed-upon legal services have not been</p>	

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					<p>completed.</p> <p>May be incentive for lawyers to minimize clear description in fee agreement of agreed-upon services to be provided. Greater clarity and detail should be encouraged.</p> <p>No ABA counterpart thus does not advance goal of national uniformity. No judicial or other authority, or national experience, to inform of consequences of adopting a novel rule.</p> <p>Submitted to BOGs for preliminary approval without prior public comment as mandated by State Bar rules, thus suffers from lack of input from affected practitioners.</p> <p>May result in lawyers declining to accept representation on flat-fee basis providing disservice to clients who require certainty of flat-fee arrangement vs. potentially limitless cost of retaining counsel on hourly basis.</p>	
2	Ingber, Joe	D	No	1.5(e)	To modify/abolish rule 1.5(e) re: non-refundable retainer agreements, would create chaos in an unnecessary manner. Please vote against this abolition.	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which</p>

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						<p>constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>
30	Johnson, Phil	D	No	1.5(e)(2)	<p>As a criminal lawyer who has served in the public defenders' realm in Louisiana and California for over 20 years and then in a solo or independent contractor capacity, I depend on simplicity and clarity in contracts with clients who need representation, but who do not have a lot of money. I protest this rule. But I will leave to others with more experience and insight the task of adequately explaining to the Commission why the substance of this new rule is abhorrent.</p>	

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					<p>I write separately to protest the abysmal lack of notice to the members of the Bar this paid organization was created to assist and serve. I submit that if I similarly tried to foist upon a client - - without any prior notice - - a contract that allowed me to change my hourly rate under certain circumstances (i.e., DA suddenly amends information to include enhancements and priors, or refuses to cooperate in providing discovery, judge issues stunning rulings requiring pretrial writs, etc.) because I cannot modify it any other way, the client-attorney relationship would be adversely impacted. It follows that his case would suffer along with the client's best interests, a complaint would inevitably follow and much energy and time would be lost in a lose-lose situation with absolutely no benefit to anyone. And of course, I would probably be hauled before the Bar Court as one of those villains who are out to gouge clients and otherwise cast aspersions on the legal profession.</p> <p>That is how I view this failure to effectively notify the rank and file that this unsupported and unsupportable engraftment is coming down the pike one more time. Why is notice such a problem in these troubling areas?</p> <p>In 35 years of practice, like the vast majority of others on this list, I have never been cited by any state bar for any malfeasance. Fortunately, I am semi-retired and so this concern has somewhat less impact on me than for my less aged brethren. For now, I just hope I can</p>	

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					live out my days without looking over my shoulder for more trebuchetlaunched boulders like this one, raining down from the sky. This may speed up my decision to do something else for a living with less downside. I also feel that it may lead others to do the same thing.	
52	Kolodny, Stephen	D	No	1.5(e)(2)	<p>I write this letter to express my opposition to the proposed new Rule of Conduct that would abolish the right of lawyers to charge flat or non-refundable fees. For many different reasons, in family law, such a Rule would be grossly unfair to the lawyers and allow many clients to receive services at a cost far below the reasonable compensation for the work, effort and experience that goes into the representation of that client.</p> <p>In family law it is not uncommon for potential clients to go around and conflict out lawyers they do not want to have as opposing counsel. Sadly, this is a practice that is promulgated by some lawyers in our community but also has clearly taken hold in the general community because of the proliferation of this kind of advice on various special interest web sites. One of the ways a high profile law firm can protect itself from this kind of practice is to have non-refundable retainer agreements so that the client does not hire you, conflict you out and then fire you, paying only for an hour or so of your time. There is truly a premium value to the retention of certain lawyers in all fields, unfortunately in the Family Law field the concept of "conflicting out" has become a tactic used by some litigants and some lawyers.</p>	

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					<p>In Family Law it is not uncommon for some of us to substantially limit the intake of cases so that we can provide full and complete services to the clients we commit to represent. Only by knowing that there will a specific fee [minimum fee] can we afford to do that. If a client is accepted and then we turn away another potential client because of work load commitments, we should not be prejudiced because the client we accepted then chooses to leave before much work is done.</p> <p>In Family Law we are often asked to prepare Pre or Post Nuptial Agreements, which are documents that have very substantial potential liability associated with them. The fees charged are document specific fees, not related to time expended. Prohibition of flat fees [which are a form of non-refundable retainers or will ultimately be categorized as such] would severely inhibit the willingness of lawyers to provide services in this difficult area.</p> <p>To my knowledge, members of the Bar practicing in many fields including bankruptcy, immigration, family law, criminal law, tax law, and SEC law, as well as entertainment and real estate law understand that there is nothing about a non-refundable retainer that permits a lawyer to charge an unconscionable or clearly excessive fee. That is, the non-refundable retainer, as with any other traditional fee arrangement,</p>	

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					<p>has always been subject to well-established professional rules that apply to the unscrupulous lawyer who extracts an unconscionable fee as a "non-refundable retainer" from a naive client, has no established basis for doing so or to justify the amount charged, does little or no work, and keeps the clients' money. These rules include: (1) the case-by-case Rule against charging excessive fees (Rule 1.5(a)) and (2) the longstanding Rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). Common sense, fairness, and the existing protections against unconscionable fees, dictate that under a non-refundable retainer arrangement, except as allowed by historical rules and precedent, if a lawyer does very little or no work, the client is entitled to a full refund.</p> <p>Similarly, members of the Bar have almost universally recognized that when a client signs an agreement and pays a non-refundable retainer, there are unanticipated events that can result in a refund of a non-refundable retainer. For instance, a client would be entitled to a full refund if his/her lawyer gets sick and does no work. Likewise, an honest lawyer would refund a \$10,000 non-refundable retainer if, shortly after receiving it, the client changes her mind and fires him/her without cause, and the lawyer has not done any meaningful work. In these and many other unanticipated circumstances, a non-refundable retainer would be "unconscionable" under Rule 1.5(a)</p>	

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					<p>and an honest lawyer would refund the unearned portion of the fee.</p> <p>If adopted, Paragraph (e) to abolish non-refundable retainers (Ex. 2) will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, seriously undermine the attorney-client relationship, and prevent many clients from obtaining representation. It is contrary to the interests of the two groups who are most affected, the lawyers and their clients because, for example:</p> <p>1. The Board of Governors adopted this 2009 Proposal without any input from the membership. Considering the significance of Paragraph (e) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission should have publicized and/or explained these changes to ensure that a cross-section of the bar knew of their existence so that the membership could meaningfully respond or object before the Board of Governors' tentative approval. Rule of the State Bar 1.10(A) ("Public Comment") requires Proposals for the Rules of the State Bar to be circulated for public comment before adoption, amendment, or repeal by the Board of Governors. Section 1.10(B)(2) states that Public Comment is not required: "(2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal." This 2009</p>	

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					<p>proposal cannot be reasonably interpreted as a "non-substantive" "modification" of the abandoned 2008 proposal, Rule 1.5(f). The current after the fact public comment does not solve this problem. See discussion Ex. 1. P. 12.</p> <p>2. Paragraph (e) prevents fully-informed clients and their lawyers from knowingly entering into a non-refundable retainer agreement that benefits clients. It ignores the reality that since the 19th century, thousands of California lawyers have used some form of the non-refundable retainer (that falls outside of the limited exceptions in Paragraph (e)'s ban on non-refundable retainers in (e) (1) and (2)).</p> <p>3. There is no identifiable pattern of abuse or wrongdoing by California lawyers resulting from the current rules that mandates the abolition of the non-refundable retainer or that would be remedied by this sweeping change. The Proposal is a solution in search of a problem.</p> <p>4. The Proposal ignores the fact that in October of 1992, the Board of Governors concluded that a non-refundable retainer "earned when paid" was a perfectly appropriate fee arrangement. The Board of Governors endorsed the continued use of "fixed fees," and "flat fees," and "non-refundable retainers," to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly</p>	

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					<p>spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid." See October 1992 State Bar Memorandum and attachments in connection with a "Request that the Supreme Court of California Approve Amendments ... to Rules of Professional Conduct." It also ignores the fact that it was the Committee on Professional Responsibility and conduct ("COPRAC") that first suggested (See May 20, 1991 COPRAC Memorandum), that any change to the rules should explicitly add "non-refundable retainers" as part of the definition of "true" retainers earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances. Id.</p> <p>5. Paragraph (c)(1) and Comment [8] prohibit the long-established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received if she does any legal work.</p> <p>6. Paragraph (e)(2) and Comment [5] would often</p>	

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					<p>require that the proposed "flat fee" to cover fees for the entire length of the case, including trial. Since this "flat fee" is required to cover contingencies (i.e., trial or an administrative evidentiary hearing), that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur.</p> <p>7. Paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the "flat fee" by representing that the fee "is the lawyer's property on receipt." The critical issue is not what the fee is called but who owns the funds.</p> <p>8. Rather than protecting the client's entitlement to a refund of the proposed "flat fee" (see proposed Rule 1.5(e)(2)(v)). Paragraph 1.5(e)(2) actually will deprive the client from ever receiving a refund if these funds are the subject of any federal or state seizure, jeopardy assessments, restraining order or forfeiture, or even attachment by potential creditors. The lawyer cannot return all or part of the fee to the client because the seizing agency will be entitled to any fee refund.</p> <p>9. Paragraph (e)(2) exposes lawyers performing all types of legal services to extrinsic litigation or significant financial risk by facilitating the restraining and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with</p>	

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					<p>the IRS, the Franchise Tax Board, the S.E.C., or is the potential target of a civil or criminal forfeiture or restraining order, or is vulnerable to potential creditors' claims.</p> <p>10. Because Paragraph 1.5(e)(2) will substantially increase the risk of attorney fee forfeiture or civil seizure, compliance with Paragraph (e) deprives those accused of crimes of their constitutional rights to retain the lawyer of their choice and many family lawyer litigants of their ability to retain counsel.</p> <p>11. Paragraph (e)(2) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and will result in clients filing arbitration claims, lawsuits, or Bar complaints.</p> <p>12. The Proposal will generate increased client bar complaints, arbitration claims, and civil actions involving fee disputes, for example, when an attorney and a client cannot agree on the amount of funds that must be returned in an advance fee case even when an attorney is terminated without cause.</p> <p>13. Paragraph 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact</p>	

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					<p>patterns that will develop. It is also inconsistent with the "sanctified" State Bar fee forms (that have been distributed by the Bar for approximately the past 20 years) that represent the "gold standard" for California lawyers.'</p> <p>14. The Proposal impacts the economic viability of small law firms and the practice of large firms. If the lawyer agrees to the proposed advance "flat fee" that is earned when received and substantially underestimates the legal work, he will certainly not be terminated by the client. However, when the lawyer through skill and ability has, in a short time obtained a significant result that is not outcome-determined in an ongoing case, the Rule encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee" that under this Proposal would no longer be "the lawyer's property" or property to which the lawyer is entitled. This Proposal effectively penalizes an effective and/or efficient lawyer or the promotion of early resolution of disputes, all of which is contrary to the legislature's stated intent in the Family Code and which should be the principal to which all lawyers should subscribe.</p> <p>The proposed new Rule 1.5(e), drafted by the Commission, essentially prohibits non-refundable fees for performing legal services. In doing so, it abolishes and/or redefines a widely accepted historical fee arrangement, and in reality will provide that most</p>	

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					payments to do legal work in the future will not be earned when received regardless of the attempts in Rule 1.5(e) to inaccurately describe some fees as "the lawyer's property upon receipt."	
46	Langford, Carol	D	No	1.5(f)	<p>A lawyer has a fiduciary relationship, a relationship of confidence and trust, to always put the needs of the client above his or her own. When trust is breached, the integrity of the legal system and the public's respect for the legal profession is jeopardized. The Proposed Rules are designed to regulate lawyer's conduct and bolster the public's confidence in the legal profession. I am concerned that the language of Rule 1.5(f) does not set a high enough standard to protect a client's interest in cases of modification.</p> <p>Rule 1.5(f) language states that a lawyer shall not make a modification that is "adverse." Adverse is defined as a modification that "benefits the lawyer in a manner that is contrary to the client's interests." I am concerned this language is unclear. Whether a particular modification is adverse to the interest of the client always depends on the circumstances. I believe that a modification that increases a client's fee for a project should be adverse. In addition, adverse modification occurs when the client is coerced or agrees to it under duress or threat of non-performance.</p> <p>However, not all modifications are adverse. A</p>	

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					<p>modification that extends the time within which a client is obligated to pay a fee ordinarily is not adverse. The current language does make clear these distinctions. It doesn't set forth a requirement that the client who consents to the modification in writing can do so only if it is knowing and intelligent and the deal is fair and reasonable. The proposed rule will not deter adverse modifications and promote ethical transactions between lawyers and their clients.</p> <p>I support the adoption of a higher standard in evaluating interests adverse to clients as in current Rule 3-300. It states that a lawyer must avoid interests adverse to a client unless all three requirements are satisfied. These requirements are: a) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and (b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and (c) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition and the lawyer's role in the transaction or acquisition, including whether the lawyer is representing the client in the transaction or acquisition.</p>	

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56	Law Practice Management Section, State Bar of California [William E. Hoffman]	M	No	1.5	<p>The State Bar Should Acknowledge and Encourage Alternative Fee Arrangements.</p> <p>LPMT believes that Proposed Rule 1.5, as drafted, would hamper the development of alternative fee arrangements, arrangements that would benefit clients and attorneys alike. This consequence is particularly likely given the historical emphasis on hours as the billing touchstone – a touchstone that will likely be less relevant in evaluating alternative arrangements. The Proposed Rule should more directly acknowledge and encourage such alternative fee arrangements, in addition to contingency fees and strictly flat fees.</p> <p>The failure to remove hours expended as the litmus test of conscionability interferes with the development of alternative fee arrangements, which can be of great worth to clients as they plan and budget. Hours expended are often irrelevant and should not be the standard by which such alternative fee arrangements should be judged. Many lawyers on fixed fees do not keep track of time – that is one of the benefits to both lawyer and client. Rather, alternative fee arrangements can provide the client with much-valued specificity and certainty of cost and time.</p> <p>On the lawyer's side, such arrangements encourage the lawyer to invest in technology, which will yield a better and more efficient result for the lawyer's clients. Without the ability to thus amortize the capital expense</p>	

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					<p>of new technology and innovate, lawyers will see no incentive to change to more dynamic fee arrangements that would benefit both client and lawyer</p> <p>While it might not be advisable to address specific alternative arrangements in the Proposed Rule itself, LPMT does urge the Commission to revise its Comments to Proposed Rule 1.5. In particular, we highly recommend that the Commission:</p> <ul style="list-style-type: none"> • note that such alternative fee arrangements are subject to the proscription against unconscionable fees; and • acknowledge that the factors used to evaluate the conscionability of fees can and should be weighted differently in certain alternative fee arrangements. <p>By doing so, the Commission would clarify that Proposed Rule 1.5 is not meant to chill the development of such alternative fee arrangements, while at the same time ensuring that such arrangements are nevertheless subject to a fundamental ethical standard.</p> <p>For the foregoing reasons, we recommend that Comment [1B] be amended as follows:</p> <p>[1B] Paragraph (b) defines an unconscionable fee. (See <i>Herrscher v. State Bar</i> (1934) 4 Cal.2d 399,</p>	

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					402 [49 P.2d 832]; <i>Goldstone v. State Bar</i> (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. <u>Indeed, it is anticipated that the weighting of factors and the relevance of each factor would be dependent upon the facts of a given fee arrangement.</u> Contingent fees and other alternative fee arrangements, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule. In-house expenses are charges by the lawyer or firm as opposed to third-party charges.	
32	Linscheid, E. Michael	D	No	1.5(e)(2)	The proposed rule ignores the realities of the practice of criminal defense. Currently, the nonrefundable fee allows a client to pay a known amount which will cover the entirety of his criminal representation without additional fees. An attorney and client that enter into a contract for a nonrefundable retainer can feel secure that the retainer fee will cover the representation of the client through trial. Such a retainer allows a client to make decisions about a legal defense without taking into consideration the additional costs that may be incurred.	
58	Loftus, Richard A.	D	No	1.5(e)(2)	I am a sole practitioner in the area of criminal defense. The proposed rule is unnecessary, interferes with my ability to contract with potential clients, and in many cases would result in my charging fees that would be	

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					<p>much greater than those charged as a flat fee.</p> <p>In many cases, I make court appearances over and above the necessary minimum number strictly for the purpose of benefiting an interest of the client. If my fee arraignments were now all going to be done on an hourly basis, the cost to the client would increase dramatically. Most of my clients could not afford this increase, and be forced to make difficult decisions, based upon limited resources, that would not be in their best interest.</p> <p>I would respectfully urge the rejection of the Proposed New Rule 1.5(e)(4-200)</p>	
13	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee (PREC)	M	Yes	1.5(e)(2)	<p>The proposal discourages lawyers from efficiently resolving matters given the potential it creates for a client to request a refund because “the agreed-upon legal services have not been completed.” For example, if a lawyer settles a matter before trial, a fee agreement that provided that the fee would cover representation through trial could be construed to require a partial refund, even though the case was favorably resolved. This would be unfair, and is contrary to the longstanding treatment of what constitutes an earned fee.</p> <p>Sub-parts (e)(2)(i), (ii) and (iv) are equally applicable to all types of retainer agreements. Including them in a sub-part that pertains only to flat fee agreements creates the misleading negative inference that these</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the</p>

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					<p>requirements may not apply to hourly or contingency fee agreements. If it is desirable to mandate that fee agreements contain additional provisions, this should be accomplished through the existing statutory framework in the B&P Code. The Legislature could choose to amend sections 6147 and 6148 to specifically address flat fees, but attorneys who use flat fee arrangements should not be singled out for discipline for failing to have details in a fee agreement that are not required for other type of fee arrangements.</p> <p>Sup-part (e)(2) provides that the fee is the “lawyer’s property on receipt,” but also requires the attorney to state that the client “may be entitled to a refund” under certain circumstances. This is confusing. Also, stating that a fee is the lawyer’s property on receipt suggests the creation of substantive law. Isn’t the intent simply to clarify that a flat fee need not be placed in the client trust account? To describe the fee as the “lawyer’s property” increases the likelihood of future litigation over who owns the fee, especially when combined with the mandate that counsel state that the client may be entitled to a refund. Ambiguities in fee agreements are construed against the lawyer, and this draft rule mandates an ambiguity.</p> <p>The proposed language in sub-part (e)(2) is unnecessary in light of the prohibition on charging unconscionable fees, a traditional and well established</p>	<p>client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer’s property immediately on receipt; (iv) that the fee agreement does not alter the client’s right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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					<p>standard which sufficiently safeguards clients from unscrupulous lawyers who overcharge clients, and which provides a uniform standard regardless of the type of retainer agreement involved.</p> <p>The language of (e)(2) may discourage the attorney from providing details in the fee agreement regarding the extent of the work for which a flat fee is being paid because of the potential it creates for a client to request a refund because “the agreed-upon legal services have not been completed.” The proposed language will foment greater discord over fee agreements, which is not in the interests of either clients or the legal profession.</p> <p>This proposal likely will lead to litigation in the context of an injunction, jeopardy assessment or forfeiture. It may lead to substantial problems in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace. The reason for this is that persons or entities with a claim against a client will seek to seize and forfeit a client’s potential interest in obtaining a refund based on the client’s possible right to “be entitled to a refund of a portion of the fee.” How would a creditor of the client know whether the agreed upon services were or were not provided?</p> <p>This proposal has no counterpart in the ABA Model</p>	

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					<p>Rules. Thus, it does not advance the intended goal of national uniformity that is among the purposes for revising California's existing rules of professional conduct.</p> <p>Finally, PREC is aware that some practitioners have expressed concern that this provision was presented to the State Bar Board of Governors without the prior public comment that is required by State Bar Rule 1.10. If there has been a failure to comply with any procedural rule, PREC believes that the Rules Revision commission should consider recommending necessary corrective action in order to ensure that all of California's new Rules of Professional Conduct are lawfully adopted.</p>	
63	Los Angeles Public Defenders [Michael Judge]	NI	No	<p>Comment [9]</p> <p>Comment [10]</p>	<p>Comment [9] refers to paragraph (f)(2) but there is no paragraph (f)(2). Paragraph (e)(2) was probably intended.</p> <p>Comment [10] refers to Rule 1.0.1(n), the definition of "signed," but there is no such provision in Rule 1.0.1.</p>	
6	Martinez, Martin James	M	No	1.5(e)	<p>The Proposed Rule is cause for concern in as much as it will have detrimental effects on criminal defense attorneys.</p> <p>The best solution would be to continue to allow criminal retainers to be placed in the general account as a classic true non-refundable retainer. If the rules committee is still determined to eliminate the use of non-refundable retainers, then a workable compromise</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those</p>

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					would be an amendment to the Proposed Rule that it is not a violation of the rules of professional responsibility to place the retained funds in the general account in criminal defense matters. This would alleviate concerns of the State Bar, of the chilling effects that a non-refundable retainer would have in the eyes of the client, thinking that they cannot change counsel. Yet, this amendment would allow criminal defense attorneys to continue to maintain an active law office. If the funds are placed in trust, it would hamper the everyday operations of the criminal law office.	services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.
41	Meltzer, Paul	D	No	1.5(e)(2)	I join in the opposition to the Proposed Rule filed by the California Attorneys for criminal Justice (CACJ).	
9	Moss, Richard	D	No	1.5(e)	Abolishing non-refundable retainers will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, seriously undermine the attorney-client relationship, and prevent many clients from obtaining representation. Considering the significance of Paragraph (e) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission	To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows: (2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those

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					<p>should have publicized and/or explained these changes to ensure that a cross-section of the bar knew of their existence so that the membership could meaningfully respond or object before the Board of Governors' tentative approval.</p> <p>Paragraph (e) prevents fully-informed clients and their lawyers from knowingly entering into a non-refundable retainer agreement that benefits clients. It ignores the reality that since the 19th century, thousands of California lawyers have used some form of the non-refundable retainer (that falls outside of the limited exceptions to Paragraph (e)'s ban on non-refundable retainers in (e)(1) and (2)).</p> <p>The Proposal ignores the fact that in October of 1992, the Board of Governors concluded that a non-refundable retainer "earned when paid" was a perfectly appropriate fee arrangement. The Board approved/endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid."</p> <p>Paragraph (e)(1) and Comment [8] prohibit the long-established practice of charging a minimum fee to ensure availability (true retainer) when the client will</p>	<p>services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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					<p>also be credited for future work done either on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received if she does any legal work.</p> <p>Paragraph (e)(2) and Comment [5] would often require that the proposed "flat fee" to cover fees for the entire length of the case, including trial. Since this "flat fee" is required to cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur.</p> <p>Paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the "flat fee" by representing that the fee "is the lawyer's property on receipt." The critical issue is not what the fee is called but who owns the funds.</p> <p>Rather than protecting the client's entitlement to a refund of the proposed "flat fee" (see Proposed Rule 1.5(e)(2)(v)), Paragraph 1.5(e)(2) actually will deprive the client from ever receiving a refund if these funds are the subject of any federal or state seizure, jeopardy assessments, restraining order or forfeiture,</p>	

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					<p>or even attachment by potential creditors. The lawyer cannot return all or part of the fee to the client because the seizing agency will be entitled to any fee refund.</p> <p>Paragraph (e)(2) exposes lawyers performing all types of legal services to extrinsic litigation or significant financial risk by facilitating the restraint and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with the IRS, the Franchise Tax Board, the S.E.C., or is the potential target of a civil or criminal forfeiture or restraining order, or is vulnerable to potential creditors' claims.</p> <p>Because Paragraph 1.5(e)(2) will substantially increase the risk of attorney fee forfeiture or civil seizure, compliance with Paragraph (e) deprives those accused of crimes of their constitutional rights to retain the lawyer of their choice and many civil clients of their ability to retain counsel.</p> <p>Paragraph (e)(2) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and will result in clients filing arbitration claims, lawsuits, or Bar complaints.</p> <p>The Proposal will generate increased client bar complaints, arbitration claims, and civil actions</p>	

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					<p>involving fee disputes, for example, when an attorney and a client cannot agree on the amount of funds that must be returned in an advance fee case even when an attorney is terminated without cause.</p> <p>Paragraph 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It is also inconsistent with the "sanctified" State Bar fee forms that represent the "gold standard" for California lawyers.</p> <p>The Proposal impacts the economic viability of small law firms and the practice of large firms. If the lawyer agrees to the proposed advance "flat fee" that is earned when received and substantially underestimates the legal work, he will certainly not be terminated by the client. However, when the lawyer through skill and ability has, in a short time obtained a significant result that is not outcome-determinative in an ongoing case, the Rule encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee" that under this Proposal would no longer be "the lawyer's property" or property to which the lawyer is entitled.</p>	
39	Mueller, Gael G.	D	No	1.5(e)(2)	The only people who would even raise this issue are those who have never practiced criminal law. People who come to a criminal defense attorney can not afford hourly fees and most would not understand them.	

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					<p>They would not pay the bill.</p> <p>More importantly, the work required on a criminal case could not be done as monies received would be in the trust account. For instance, discovery on a criminal matter is charged to a private criminal defense attorney by the District Attorney's Office. This can run into hundreds of dollars depending on the complexity of the case and must be paid "up front". The amount of discovery is unknown to the attorney until it is received.</p> <p>Additionally, the number of appearances, the number of phone calls, the number of hearings are all unknown quantities at the time that a client retains a criminal defense attorney. An hourly estimate is impossible and could run into hundreds of thousands of dollars for a case which now costs around 20-30 thousand.</p> <p>We do not bill on hourlies for a very good reason-people need us to protect their constitutional rights-not just their money.</p> <p>This new "rule" would shut down my business. I will not charge people on an unreasonable basis.</p>	
17	National Association of Criminal Defense Lawyers (NACDL)	D	Yes	1.5(e)(2)	NACDL is concerned that the present text of Proposed Rule 1.5(e)(2) undermines the Sixth Amendment right to counsel by impairing the ability of lawyers and clients to agree that a client will pay a flat fee for legal representation by counsel in a specified matter. As	

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					<p>drafted, the language of the Proposed Rule will substantially discourage, if not preclude, criminal defense lawyers from offering to represent clients on a flat fee basis. This is a common form of retention in criminal cases in California and throughout the country.</p> <p>The Proposed Rule discourages flat fees by making flat fees received by counsel vulnerable to third-party claims against clients and/or their property, forfeitures, jeopardy assessments, seizures, liens and attachments. These types of claims would be asserted <i>against counsel</i> because of the inchoate interest the Proposed Rule appears to give a client in fees which purportedly were the "lawyer's property on receipt." This additional potential risk and expense will cause many, if not most, criminal defense lawyers to decline to agree to represent clients on a flat fee basis.</p> <p>Discouraging counsel from using flat fee arrangements is a disservice to those clients who may desire such fee arrangements. Flat fee arrangements allow persons who are under investigation or accused of offenses to plan in advance and reduce the risks they face. If such persons were unable to secure representation in a matter for a flat fee, they would receive the service of counsel retained on an hourly basis only as long as they could continue to compensate counsel on an hourly basis.</p>	

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					<p>Flat fee arrangements place the bulk of the risk upon lawyers, and enable risk-sharing between clients and defense counsel. A virtual ban on flat fees – as would result from adoption of the Proposed Rule – will shift the entire burden to clients and disproportionately burden less wealthy individuals.</p> <p>Proposed Rule 1.5(e)(2) is unnecessary in light of the prohibition of unconscionable fees, a uniform standard applicable to all types of fee arrangements, including contingency, hourly and flat fees. This standard is sufficient to protect clients from being charged unreasonable fees, and to safeguard clients from excessive charges where a client chooses to discharge counsel, or other unforeseen circumstances arise such as the death of a client or counsel prior to the conclusion of a matter.</p> <p>The language of the Proposed Rule that provides a fee is the “lawyer’s property on receipt,” but a client also “may be entitled to a refund,” under certain circumstances, is internally inconsistent and confusing. Clarity, rather than confusion, best serves clients and counsel with respect to retainer agreements.</p> <p>There is no counterpart to Proposed Rule 1.5(e)(2) in the ABA Model Rules and there is no national authority to provide guidance on how the provision may be interpreted by California disciplinary authorities or courts. Accordingly, it may create uncertainty and the</p>	

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					<p>potential for protracted and costly litigation, rather than certainty, which best serves the interests of both clients and counsel.</p> <p>Sub-parts (e)(2)(i), (ii) and (iv) are equally applicable to <i>all</i> types of retainer agreements, but placing them in a sub-part that pertains only to flat fee agreements creates the inaccurate negative inference they may <i>not</i> apply to hourly or contingent fee agreements.</p> <p>The Proposed Rule could discourage detailed descriptions of the “agreed-upon legal services” in written retainer agreements because it encourages third parties to assert an interest on a previously paid fee on the grounds that “the agreed-upon legal services have not been completed.” This would increase disputes between clients and counsel.</p> <p>Finally, NACDL is concerned that Proposed Rule 1.5(e) is among a large number of Proposed Rules that were provisionally adopted in a manner that may have deprived the Board of Governors of the State Bar of California of the insights of lawyers, and other members of the public, who have knowledge and experience with flat fee arrangements. NACDL understands that Proposed Rule 1.5(e) was among a number of provisions adopted by the Board without the prior public comment required by Rule 1.10 of the Rules of the State Bar of California. NACDL believes that public comment in accordance with Rule 1.10 is</p>	

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					<p>overreaching on the attorney's part (see <i>Herrscher v. State Bar</i> (1935) 4 Cal.2d 399, 403; <i>In the Matter of Van Sickle</i> (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see <i>Herrscher v. State Bar, supra</i>, 4 Cal.2d at 403); (3) whether the client consented or authorized the legal service (see <i>In the Matter of Connor</i> (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 93, 104); (4) whether the attorney fully explained the fee agreement to the client and/or the client understood the terms of fee agreement (see <i>In the Matter of Kroff</i> (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851; <i>In the Matter of Van Sickle</i> (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980); and (5) whether the services are legal in nature and whether the attorney charges the client for clerical or non-legal services at the same rate as legal services. Other states have disciplined attorneys for charging the same fee for these non-legal services at the legal services rate. (See e.g. <i>In re Green</i> (Co. 2000) 11 P.3d 1078 [charging lawyer's rate for faxing documents, etc]; <i>Prof'l Ethics & Conduct of Iowa State Bar v. Zimmerman</i> (Iowa 1991) 465 N.W.2d 288 [lawyer charged full hourly rate for attending ward's birthday party and discussing toiletry needs]; <i>Cincinnati Bar Assn v. Alsfelder</i> (Ohio 2004) 816 N.E.2d 218 [charging for discussions and advice about boyfriends, vehicles, and restaurants].)</p> <p>3. The Commission may want to state in the rule that</p>	

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				1.5(c)	the factors set forth in subsection (c) are not exclusive. At least one appellate court has expressed some uncertainty on this issue. (See <i>Shaffer v. Superior Court</i> (1995) 33 Cal.App.4th 993, 1003.) Although this is stated in Comment 1B, OCTC believes it is more appropriately stated in the rule itself.	
				1.5(b)	4. We believe that the proposed definition of an "unconscionable fee" as currently drafted is inconsistent with case law. The proposed definition in subparagraph (b) states in pertinent part, that a fee is unconscionable if the lawyer "has engaged in fraudulent conduct or overreaching." Proposed rule 1.0.1(d) states "fraud or fraudulent means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive." This suggests that all the elements of civil fraud must be present to constitute unconscionability. However, under the case law, it is sufficient that the negotiation, setting or charging of the fee "involves an element of fraud or overreaching, which may not require proof of all of the elements of civil fraud. (See <i>Herrscher v. State Bar, supra</i> , 4 Cal.2d at 403; <i>In the Matter of Van Sickle, supra</i> , 4 Cal. State Bar Ct. Rptr. at 989.)	
					5. <u>True retainers, non-refundable fees, and flat fees.</u> OCTC supports the concept proposed in subparagraph (e) regarding true retainers, non-refundable fees, and flat fees. Proposed paragraph (e) is nothing more than a reiteration of current law regarding true retainers,	

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				1.5(e)	<p>non-refundable fees, and flat fees. Several of the commentators opposed to subparagraph (e) appear to be under a misunderstanding of current law. It is well established that only a true retainer to secure an attorney's availability over time is non-refundable. This is because it is considered earned when paid. Advanced fees, however, no matter how the attorney characterizes them, must be refunded if not earned. A failure to do is disciplinable. (See <i>In the Matter of Lais</i> (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907; <i>In the Matter of Phillips</i> (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315; <i>In the Matter of Fonte</i> (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752; <i>Matthew v. State Bar</i> (1989) 49 Cal.3d 984.) Flat fees also must be earned by performance of services. Any attempt to deal with the issue of creditor rights and government forfeiture rules as proposed by some of the other commentators is beyond the scope of the Rules of Professional Conduct.</p> <p>6. The one change subparagraph (e) does add to the rule is the requirement for written fee agreements. Given the unusual nature of these agreements and the need to make sure the clients are aware of and understand them, it is good public policy to require that they be in writing and places California closer to what is required in other jurisdictions.</p>	

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				1.5(e)		
43	Orange County Bar Association ("OCBA")	D	No	1.5(e)(2)	<p>We are aware that a number of other persons have raised the concern that the Board of Governors adopted this proposed rule in the first instance without conforming to public comment procedures established in State Bar Rule 1.10. The OCBA believes that the State Bar should be concerned with the potential implications if the rule is adopted without complying with its own procedural rules.</p> <p>Substantively, the OCBA is opposed to the present formulation of Rule 1.5, and especially the provisions of paragraph (e)(2) and the comments related to that section.</p> <p>There already is an existing statutory scheme for written fee agreements in B&P Code sections 6146 through 6148. Several of the terms i n proposed</p>	

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					<p>paragraph (e)(2) are already contained in these statutory requirements. If there is concern that flat fee arrangements contain peculiar risks for clients, those should be addressed within the existing statutory framework. Lawyers are not subject to discipline for failing to comply with B&P Code sections 6147 and 6148. It would be inappropriate to impose disciplinary consequences only upon those lawyers who charge flat fees, and not those who enter into other fee arrangements.</p> <p>Paragraph (e)(2) mandates five contract terms that "shall" be set forth in the flat fee agreement. The 'OCBA believes that requiring inclusion of all of these provisions actually will lead to greater uncertainty and confusion. For instance, it is internally inconsistent to state that the flat fee is the lawyer's property immediately upon receipt, while at the same time mandating that the fee is refundable. Lawyers may believe and claim the fee has been fully earned because the rule declares it is their property. It should not be an ethical requirement that the lawyer state in writing that a fee which is the lawyer's property might have to be given back. This will create ambiguity, resulting in more disputes over whether or not the fee is refundable.</p> <p>It would be very simple to state expressly in the rule that flat fees for specified legal services contractually agreed to between attorney and client need not be</p>	

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					<p>placed in the client trust account, without also stating that the flat fee is the attorney's property. That solves the issue of whether or not the fees may be placed in the general account.</p> <p>Whether or not such fees are refundable to a client when the representation ends should depend upon the parties' agreement, as well as whether the lawyer has substantially completed the tasks for which he or she was retained. Substantial completion of the task is difficult to define. There are many factors including the possibility that an early settlement or resolution is one way to complete a task, even if the consequence is to avoid- trial or other proceedings that might have been contemplated.</p> <p>The question of whether or not the client would be entitled to a partial refund should be left to the parties' .agreement, subject only to the traditional, well-defined rules that prohibit unconscionable fees (Rule 1.15(a)), and mandate the return of an unearned fee (Rule 1.16). A lawyer should not be subject to discipline for retaining a flat fee unless that lawyer violates those rules. The question of whether the flat fee lawyer has earned the fee may be resolved just like all other fee disputes. It should not be a separate basis for lawyer discipline unless the overall fee arrangement or the fee charged was unconscionable, or was not appropriately earned by the performance of a proper degree of services. By seeking to resolve the widespread</p>	

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					<p>concern over "nonrefundable" fees, the proposed language is simply overbroad.</p> <p>There is also a risk that the disclosures mandated by paragraph (e)(2) could discourage early resolution of matters by providing incentives for flat fee lawyers to delay resolution of matters so as not to be accused of receiving an excessive fee. This could be an unintended consequence of the rule, contrary to public policy favoring early resolution of disputes. Just because a lawyer has been able to negotiate a favorable early resolution does not mean that the fee is unearned. Better guidance is needed in the comments if the intent is to provide a means of determining when a fee has or has not been earned.</p> <p>In Comment [9], there is a typographical mistake which erroneously refers to paragraph (f)(2), a provision that does not exist. We believe that is intended to refer to paragraph (e)(2).</p> <p>With regard to the substance of Comment [9], the lawyer's failure to include the required contract language would essentially convert the payment received from a flat fee to an advance fee deposit-- a refundable deposit against which a reasonable fee should be charged. Yet, because the parties were contracting for a flat fee, they did not set a rate or method of calculating a different fee. Thus, this provision will necessitate a quantum meruit</p>	

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				Comment [9]	determination in every instance where the paragraph (e)(2) language is missing, leading to more fee disputes. In summary, the OCBA is strongly opposed to the provisions of paragraph (e)(2) as presently drafted, and would discourage the Commission from imposing special contractual terms that are appropriately left to the parties or better governed by existing statutory provisions.	
20	Osterhoudt, William	D	No	1.5(e)	Non-refundable fees are a justifiable arrangement to accommodate appropriate needs of attorneys and clients in a wide variety of settings and have been long recognized by the State Bar and widely utilized without any demonstrated pattern of abuse or misconduct. Inadequate notice to and input from bar members who opposed 2008 version of rule. With recognized and effective protections in place, there is no reason to adopt a new rule absent supporting evidence that clients need protection from pattern of misconduct. Proposed change is unwarranted interference with freedom of clients and lawyers to make informed decisions re terms of representation. Provision that "true retainer" be "in addition to and apart from any compensation for legal services performed" is highly problematic because it would	

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					<p>prohibit lawyers and clients from agreeing that a retainer to secure the lawyer's availability may also be used, in whole or part, to compensate the lawyer for work actually performed.</p> <p>If any part of a "nonrefundable" fee may be refundable, then the entire fee cannot be the lawyer's property. Lawyers pay income taxes on nonrefundable fees and under 1.5(e)(2)(v) they may have to do so even though the fee may be refundable.</p> <p>Ample protections already exist to discourage unscrupulous lawyers who seek to retain substantial fees after doing little or no work, or after being discharged.</p> <p>Will invite needless disputes and litigation about circumstances under which a "nonrefundable" fee must be refunded in part.</p> <p>Comment [5] problematic and does not provide guidance. In practice, it is often impossible for attorney to know what services "probably will be required" at the outset of the representation and will not know, much less be in a position to "adequately explain" the services that will "probably" be required.</p> <p>Proposed rule would require lawyer to anticipate all stages and to embrace them within the agreement which could lead to Bar complaints and litigation.</p>	

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					<p>The meaning of “foreseeable that more extensive services probably will be required” and “adequately explained to the client” in Comment [5] will lead to administrative complaints and civil litigation.</p> <p>Urge that proposal be rejected or at a minimum, that it be withdrawn pending a full opportunity for member of the bar and various affected Bar Associations to comment.</p>	
15	Pancer, Michael	D	No		<p>I believe that the “flat fee” can play an important role in maximizing the availability of legal services, especially to those who can least afford it.</p> <p>Many clients prefer to have a “flat fee” arrangement. Unless a client is extremely wealthy, a client is concerned about the cost of legal services and often does not want to enter into an agreement where the amount is indefinite. And while there may be attorneys who would take advantage of the “flat fee” opportunity, certainly there now exists sufficient safeguards to prevent “unconscionable” fees. But if “flat fee” contracts are not going to be enforced and therefore not entered, many potential clients will find themselves unable to avail themselves of legal services that they request and require.</p>	<p>To address the commenter’s concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer’s property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer’s</p>

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						property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.
25	Paulsen, Bradley T.	NI	No		The commenter has submitted a lengthy letter with attachments complaining about the conduct of certain plaintiffs' lawyers in the construction industry are violating the law and certain Rules of Professional Conduct in soliciting client homeowners. The commenter specifically refers to certain Rules of Professional Conduct, including proposed Rule 1.5(a) and (b), and asserts that the subject lawyers are in violation of these provisions. The commenter, however, does not suggest any revisions to the identified paragraphs of the Rule, instead noting that "random review and/or inspections are needed from the State Bar on attorney actions and processes used in lawsuits and SB 800 claims."	The Commission has considered the commenter's submission and determined that his concerns lie not with the substance of the Rules, but rather with their enforcement, which is beyond the purview of the Commission's charge.
4	Perlis, Michael F.	D	No	1.5(e)	The Rule proposing the abolition of non-refundable retainers would only serve to further deprive the people of the ability to secure legal representation and/or compel attorneys who are already involved on behalf of those individuals to become involuntary pro bono advocates. Neither alternative is an appropriate avenue.	To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows: (2) a lawyer may charge a flat fee for specified legal services, which

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					<p>In practice, the non-refundable retainer as it currently operates does not do a disservice to the client. Attorney overreaching is readily remedied and most attorneys would clearly be prepared to return unused portions of retainers where it would be inappropriate to retain them.</p> <p>Proposed Rule 1.5(e)(2) does not solve the problem. It requires attorneys and clients to make binding estimates of what may be complex legal proceedings, leaves open the possibility that government agencies could require termination of counsel and return of unused retainers, and could potentially lead to attorney/client conflict relative to an evaluation of what portion of a retainer need be returned relative to non-completed legal services.</p>	<p>constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>
64	Pyle, Walter K.	D	No	1.5(e)	<p><u>Flat Fees</u>. Traditionally, criminal cases are handled on a flat fee basis (although in recent years I have seen variants or hybrids that involve flat fees).</p> <p>The proposed rule says that a flat fee is the lawyer's property on receipt, but then in the last subpart says the agreement must say "that the client may be entitled to a refund of a portion of the fees if the agreed-upon legal services have not been completed."</p>	

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					<p>First, I think this is ambiguous. For example, if I agree with a client to represent him for \$15,000 through preliminary examination, with an additional fee to be charged if an information is filed in superior court (a common flat fee arrangement), but.-I talk to the district attorney a week after the arraignment and I settle the case on very favorable terms, have I not "completed the' agreed-upon services, because there was no preliminary examination? What if I have to withdraw from the case because the client has told me he intends to commit perjury? What if the client fires me for no good reason? In my opinion I have fulfilled the contract in the first instance, and the client has breached the agreement in the second. The third situation is not a "breach," because the client always has the right to terminate the services of the lawyer, but in none of these cases should the client be entitled to a refund.</p> <p>Second, I have to pay income taxes on that full \$15,000. I only get a deduction if I refund part of the money.</p> <p>Third, requiring a refund of a fee that has already been fully earned actually means that the fee has not really been earned after all, or means that the fee is not really the lawyer's property, doesn't it? The only time that I can think of where the client is entitled to a refund of a flat fee is if the lawyer breaches the contract.</p>	

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					<p>Finally, a a flat fee is not related to the number of hours the lawyer puts in. What you look at is what the lawyer obligated herself to do. If she puts in far more hours than she believed she would when she quoted the fee (which happens fairly often), she does not get to charge an additional fee. By the same token, if she puts in far less hours than she believed she would (which happens far less often), the client should not get a refund. And with a flat fee contract, the client (and the lawyer) know exactly what the fee will be.</p> <p><u>True Retainers.</u> I have always treated a true retainer (usually in an hourly fee case) the way the rule does-it makes me available, period. Other lawyers believe that they should be able to apply hourly credits against such a retainer.</p> <p>I think the other lawyers have the better argument, and that my method results in the client paying too much. One of the most important concerns of a lawyer is whether he will get paid. In a complex case I might want to ensure I receive \$150,000, so I'm going to ask for that up front. I don't mind working for my fees, but I want to make sure I get paid. But under the rule, I would have to charge \$150,000 to be available, and then charge a further fee on top of that as I work on the case. If client could not pay the additional fee, a lawyer would have a right to withdraw from the case. I think it is more equitable to allow hourly credits to that</p>	

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					<p>\$150,000 (or a part of it), and I think the rule should allow that. It is common practice for my expert witnesses to charge a non-refundable "minimum fee" like that (and give hourly credits), and I think lawyers should be able to, too. I see no way, in actual practice, that the rule's true retainer provision "protects" the client any more than a non-refundable minimum fee. Clients are already protected by the unconscionable fee limitation in the first part of the rule.</p> <p>Finally, while it does not happen often, criminal lawyers are concerned that they will take on a complex case but the government will seek to seize the fee as the property of the client. A non-refundable retainer (with hourly credits), which becomes the property of the lawyer upon receipt, would prevent this.</p>	
5	Ragen, Frank J.	D	No	1.5(e)	<p>I oppose the Proposed New Rule of Professional Conduct, Rule 1.5(e) (4-200), Abolishing Non-refundable retainers. A modification of the Proposed Rules of Professional Conduct which prohibits non-refundable retainers for legal service will do a disservice to the public, and create unnecessary litigation. Many times in my thirty-eight years of practice I have offered clients the option of a non-refundable retainer/flat fee for legal services or hourly billing. Many times the clients have selected the non-refundable retainer. The reason often voiced for choosing this option is that the amount of attorney fees is capped by the amount of the non-refundable</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is</p>

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					retainer. When an hourly billing is selected there is no limit on what the attorney's fees might be. Attached hereto is an analysis of the Proposed Rule. I agree with the analysis and I incorporate it by reference. In my years of practice I have never had a problem with a client when a client chose a non-refundable retainer as an option.	the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.
36	Rojas, Edward R.	D	No	1.5(e)(2)	For all the reasons Mr. Tarlow stated.	
14	San Diego County Bar Association	D	Yes		CA should adopt ABA Model Rule 1.5(a) with the addition of the factors in rule 4-200 to determine reasonableness.	The Commission disagrees. The Commission's recommendation for paragraph (a) of the Rule is to retain the prohibition on an "unconscionable or illegal" fee, in part, because the Commission has considered existing California case law and supports the policy reflected in that case law.
47	Schweitzer, Eric H.	D	No	1.5(e)(2)	Proposed Rule 1.5 would prevent thousands of Californians from obtaining meaningful access to the criminal courts. The scarcity of public defender resources, particularly in misdemeanor matters is becoming worse and worse from coast to coast. Those private practitioners who provide a realistic alternative	

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					<p>to going to court and pleading guilty (usually at arraignment) with the public defender must rely on non-refundable retainers in order to remain viable economic enterprises. The non-refundable retainer benefits both the public and the legal profession because fewer and fewer Californians can afford the cost of a jury trial and because most cases that would plead guilty at arraignment (with the public defender) are likely to be settled far more beneficially for the client or dismissed before trial due to the work of a flat fee compensated private counsel. Proposed Paragraph (e)(1) would have disastrous consequences on the adversary system, because most persons who could afford the relatively modest fees for legal assistance from one stage of the proceedings to the next, could in no way afford a retainer based upon availability for a trial that would, in all likelihood, never occur. Clients need certainty about the cost of a case that they simply want to have settled without the need for protracted litigation or risk. Lawyers often settle the most egregious cases to the client's benefit solely through reputation, skill and ability that would otherwise be unavailable due to the uncertainty of costs. If changed as intended, Rule 1.5 would cause a division between the lawyer's best interests and those of his or her clients. Lawyers would be logically viewed as prolonging cases just to justify a fee, rather than for any legitimate purpose, and in most instances, those criticisms would be rightly based. Please protect the integrity of the adversary system of</p>	

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					criminal justice by allowing Californians to choose to engage qualified legal counsel of their choice, when faced with criminal prosecution.	
16	Sevilla, Charles	D	No	1.5(e)(2)	<p>Subpart (2) adds uncertainty to the Rules. While the Rule states that the fee is the property of the attorney on receipt, this is contradicted by the addition of the clause stating the client, upon termination of the relationship, can demand a refund. A fee cannot be both an attorney's property if it is also subject to a client right of refund. This makes the fee status uncertain and has direct implications in matters of creditor rights and government forfeiture claims.</p> <p>The client's interest in fee contracts are already protected in a number of areas: (1) B&P Code section 6148; (2) CRPC Rule 3-300; <u>Hawk v. State Bar, In re Corona</u>; (3) CRPC Rule 3-700(D)(2); and (4) CRPC 4-200, <u>Bushman v. State Bar</u>.</p> <p>Many criminal defense lawyers are sole practitioners who regularly charge flat fees for routine criminal matters. This Rule unnecessarily puts in place a condition that essentially makes the fee fixed (or "flat") only at client sufferance. If the work for the attorney is substantial, the client will be content with a fixed fee. But if the attorney seems to be on the way to a speedy result that will end the case on a favorable note for the client, the client can pull out of the "flat fee" contract, fire the attorney, and demand a substantial refund. There is no such thing as a "flat" fee when one party to</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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					the contract can void it at will.	
61	Sheahen, Robert	D	No	1.5(e)(2)	<p>Nonrefundable retainer fees benefit both attorney and client.</p> <p>We are not talking about gigantic or unconscionable fees. But a reasonable nonrefundable retainer fee is of the essence in the practice of criminal law.</p> <p>Suppose, for example, Attorney A charges a refundable \$10,000 fee against \$350 an hour. Attorney A then proceeds to spend 30 hours on the case doing, say, "research." The fee is exhausted and the client has received nothing -- except a request for an additional fee.</p> <p>Attorney B, however, knows his way around. He charges a nonrefundable fee of \$10,000 --- or a minimum fee of \$10,000 -- and puts in only ten hours on the case -- and gets a dismissal for the client. Should this attorney -- having achieved a great result for the client -- be forced to return most of the fee?</p> <p>In the situation of Attorney B, the new Rule would encourage attorneys simply to waste their time to build up "hours" to justify the larger fee.</p> <p>The proposed new Rule is not workable. I urge the Bar to reject it and to create a new Rule guided by "the eye of experience."</p>	

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62	Spital, Samuel	D	No	1.5(e)(2)	<p>My concerns about proposed Rule 1.5(e)(2) include the following:</p> <ol style="list-style-type: none"> 1. It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers' who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingency or flat); 2. It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that "the client may be entitled to a refund of a portion, of the fee" appears to give clients a residual interest in a fee that purportedly was "the . lawyer's property immediately on receipt." This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace; 3. It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some lawyers), to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed"; 	

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					<p>4. It may incentivize lawyers to minimize in retainer agreements the extent of the work for which a flat fee is being paid, in order to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed." Greater clarity and detail in retainer agreements, not less, should be encouraged, not discouraged;</p> <p>5. It has no counterpart in the ABA Model Rules. Thus, it does not advance the goal of national uniformity, which was among the goals of revising California's existing rules of professional conduct. There also is no judicial or other authority, or national experience, to inform us of the consequences of adopting the novel rule; and</p> <p>6. It was submitted to the State Bar Board of Governors for preliminary approval without the prior public comment that is mandated by State Bar Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.</p> <p>Because of the preceding issues, if the proposed new rule were adopted in its existing format, many lawyers would decline to represent clients on a flat fee basis. Ultimately this would be a substantial disservice to clients because many require the certainty that a flat-fee arrangement provides, and cannot afford the potentially limitless costs of retaining counsel on an hourly basis.</p>	

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11	Tarlow, Barry	D	No	1.5(e)	<p>Rule 1.5(e), essentially prohibiting non-refundable retainers for almost all legal services, will drastically impact the economics of practicing law in California as well as the ability of people in need of representation to obtain legal services.</p> <p>Considering the significance of the 2009 revisions to Rule 1.5(e)(1)-(2) I am especially concerned that in apparent violation of State Bar Rule 1.10(A) this novel version of Rule 1.5(e)(1)-(2) prepared by the Commission for the Revision of the Rules of Professional Conduct was neither publicized nor disseminated, in any manner prior to its November 2009 approval by the Board of Governors. Therefore, the membership of the Bar was unaware of this new Rule or that it would be considered at the November 14, 2009 Board of Governors meeting and were unable to meaningfully respond or object and be heard at the RAC and Board of Governors' November meetings.</p> <p>The Commission has not published any comprehensive or detailed factual and legal analysis for enacting these extensive changes or demonstrated that a need exists to do so. Rule 1.5(e)(1)-(2) also clearly violates the "Commission Charter." The Commission has asserted that a principle reason for this Rule "is client protection." However, since 1991, I</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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					<p>have asked the proponents of attempts to abolish non-refundable retainers for evidence supporting the claim that in California there is a pattern of unethical lawyers cheating clients by using non-refundable retainers. None has been forthcoming.</p> <p>It is also significant that this prohibition appears nowhere in the ABA Model Rules. Since the 19th Century non-refundable retainers have been used in California and are currently permitted in many states. In fact, in 1992 the Board of Governors of the California Bar endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" so long as the written fee agreement explicitly spelled out the arrangement and that the fee was "earned when paid." Their decision was widely publicized. As far as I can determine, the Commission has never provided written analysis of this persuasive authority, advised the current Board of Governors of its existence and certainly has not demonstrated why it should be ignored by those who now sit on the Board of Governors.</p> <p>Prohibiting nonrefundable retainers, see 1.5(e)(2), will make these fee payments the property of the client until the work is performed. This is so regardless of the inaccurate representation set out in Rule 1.5(e)(2) requiring a written agreement by the lawyer and client asserting that the "flat fee is the lawyer's property on receipt." The critical issue in fee forfeiture and</p>	

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					<p>restraining order situations is not what the fee is called but who owns the funds.</p> <p>Abolishing the nonrefundable retainer, that for years has protected clients and lawyers from fee restraints, fee forfeiture and jeopardy assessments, will expose lawyers performing many types of legal work to great financial risk. It will facilitate the restraint or seizure of fees if the client has a potential problem involving, for example, securities law, bankruptcy, criminal law, tax law and even some creditors' claims. Why enact this novel and untested fee arrangement that will result in years of collateral litigation, when for more than 40 years the nonrefundable retainer has proved to be the best available fee agreement to protect the client and lawyer from fee restraint and/or fee forfeiture?</p> <p>The proposed Rule changes and Comments are also confusing and internally inconsistent. Rule 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat fee agreements presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It will also certainly cause clients to fire their lawyers without cause and demand a refund of fees that until now have been considered and were in fact earned when received. The result will be the filing of arbitration demands, State Bar complaints, and civil suits. Of course, if a lawyer has seriously underestimated the work involved in a complicated "flat fee" case, which</p>	

**Rule 1.5 Fees for Legal Services.
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					often occurs, ordinarily he will never be discharged without cause.	
38	Tuolumne Co. Bar Association [Mark Borden]	D	No		No comment submitted.	
29	Van Elgort, Howard M.	D	No	1.5(e)(2)	I have been a member of the State Bar of California since 1/9/62, and have been in private practice for most of this time. I also served as a Judge for 6 years in San Bernardino County. I only handle criminal cases. Eliminating non-refundable and flat fee retainer agreements will only raise fees to clients resulting in heavier caseloads for public defender offices. I know, that if I where to charge for my time on an hourly basis, my fees would far exceed that of my non-refundable retainer fee and flat fee agreements for other services. Most of my client would not be able to hire private counsel. These proposed changes are a step backwards in the Bar's effort to expand the availability of legal services.	
35	Webster, James W.	D	No	1.5(e)(2)	I have been practicing since 1977 and my practice is devoted probably 85% to criminal defense. If this rule passes my ultimate fees to my clients will need to go way up. I completely agree with the comments in the letter to you dated May 25, 2010, from Ann C. Moorman, President CACJ Board of Governors	
24	Worthington, Thomas	D	No	1.5(e)	Our office opposes the proposed new rule of professional conduct which would, for all practical purposes, abolish non-refundable retainers.	

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					<p>The most important reason that a “true retainer” should be allowed in criminal cases is that, often, the reputation of the law firm is critical to the outcome of the case. A demonstration of cooperation can lead to the filing of lesser charges and an opportunity for the client to make bail. Sometimes the best advice can give the client is an early admission of guilt, which is given great weight by the courts in deciding on the ultimate disposition. The more effective our negotiations with the District Attorney at the early stage of the proceeding, the more likely it is that a good result will be accomplished without the expenditure of the kind of time that would be involved if the case is left to languish in the congested criminal justice system.</p> <p>For a small practice to be financially viable, we must balance our caseload. Some cases resolve quickly, partly because of our excellent reputation. Others take forever no matter what we try to do. It is the cases that resolve quickly that give our firm the financial ability to represent clients who cannot manage the fees and costs involved when their cases drag on forever.</p>	
60	Zitrin, Richard (on behalf of law professors)	D	No	1.5(a), (b)	The California Commission has insisted, repeatedly and counter-intuitively, in retaining the word "unconscionable" to define the propriety of fees and - even more puzzlingly - some expenses. The ABA uses the far more intelligible word "unreasonable." Moreover, California's own Business & Professions	

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					<p>Code, in evaluating fee recoveries without written contracts, also uses the "reasonable" standard. Finally, the term "unconscionable" appears to create a higher threshold than "unreasonable," thus being lawyer-rather than client-protective.</p> <p>Thus, the California rule would perpetuate use of a difficult-to-define, rather archaic, and lawyer-protective term that is at odds with the ABA formulation and at the same time perpetuates two California standards - one under the ethics rules and one under the State Bar Act.</p> <p>This simply makes no sense. We strongly urge the Board to remove the word unconscionable and replace it with "unreasonable."</p>	